SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 405

UNITED STATES, PETITIONER,

vs.

PIONEER AMERICAN INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS

Fort Smith District

No. 570

PIONEER AMERICAN INSURANCE COMPANY and GEORGE F. CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE COMPANY, *Plaintiffs*

VS.

THE DEVELOPMENT COMPANY, INC., a corporation; CECIL LAUGHLIN, JAMES F. TAYLOR; OCIE A. ROGERS and FLORENE W. ROGERS; LEE DAVIS and JEFF DAVIS, partners d b a J. S. DAVIS & SONS LUMBER COMPANY; FIRST BANCREDIT CORPORATION, St. Paul, Minnesota; ALFRED J. ANDERSON, d b a ANDERSON PLUMBING & HEATING COMPANY; and UNITED STATES OF AMERICA, *Defendants*

Complaint—Filed March 24, 1961

Come now the plaintiffs, by their attorneys, Bethell & Pearce and Lawson Cloninger, and for their cause of action against the defendants allege and state as follows:

1. On May 24, 1956, the defendants, The Development Company, Inc., a corporation, Cecil Laughlin and James F. Taylor, became indebted to Republic Mortgage Company, Inc. a corporation, in the amount of $20,000.00, evidenced by their promissory note for that amount, with interest at the rate of six per cent per annum, payable in equal monthly installments of principal and interest in the amount of $168.78, beginning July 1, 1956, and a like sum upon the first day of each month thereafter until said interest and principal shall have been paid in full, all
8 past due principal and/or interest to bear interest at the rate of ten percent per annum. A copy of said note is attached hereto, made a part hereof, and marked Exhibit "A".

2. To secure the payment of said note, the defendant, The Development Company, Inc. executed and delivered to George F. Carpenter, Trustee for Republic Mortgage Company, Inc., its deed of trust dated May 24, 1956,

wherein it conveyed to George F. Carpenter, as Trustee for Republic Mortgage Company, Inc., the following real property situated in the City of Fort Smith, Sebastian County, Arkansas, to-wit:

> Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

3. Said deed of trust was duly acknowledged, and was on June 7, 1956, filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, and now appears of record in Book 186 at page 490.

4. In said deed of trust, the defendant, The Development Company, Inc., waived any and all rights of redemption and or appraisement under the laws of the State of Arkansas. A copy of said deed of trust is attached hereto, made a part hereof, and marked Exhibit "B".

5. Under the terms of said note and deed of trust, the said defendants; The Development Company, Inc., Cecil Laughlin and James F. Taylor, agreed to make monthly payments of principal and interest in the amount of $168.78, and in addition thereto agreed to pay monthly one-
9 twelfth of the annual taxes and special assessments and one thirty-sixth of the three year hazard insurance premium, subject to such adjustments as might be necessary to meet the payments as they fell due.

6. Under the terms of said deed of trust it is provided that if the grantor fails to pay interest on said note when due, or fails to make payments on principal, hazard insurance, taxes or special assessments when due, then at the option of the grantee, all of the indebtedness secured by said deed of trust shall become due for all purposes and the Trustee may proceed to sell the property, or to foreclose the said deed of trust in any court of competent jurisdiction.

7. On July 27, 1956, Republic Mortgage Company, Inc. endorsed said note and assigned said deed of trust for value received to plaintiff, Pioneer American Insurance Company, Fort Worth, Texas, the assignment having been duly acknowledged and filed for record in the office of the re-

corder for the Fort Smith District of Sebastian County, Arkansas, on August 7, 1956, where it now appears of record in Book 190 at page 10. A copy of said assignment is attached hereto, marked Exhibit "C", and made a part hereof.

8. On March 4, 1958, the defendant, The Development Company, Inc., executed, acknowledged and delivered to the defendant, Ocie A. Rogers and Florene W. Rogers, husband and wife, its corporation deed to the real property described in paragraph 2 above, which deed was filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 158 at page 255. The said deed provides that it is given subject to the deed of trust held by the plaintiffs, hereinabove described, and the grantees assumed and agreed to pay the unpaid balance due thereunder.

9. On March 4, 1958, the defendants, Ocie A. Rogers and Florene W. Rogers, executed, acknowledged and delivered to the defendant, The Development Company, Inc., their mortgage on the real property hereinabove described to secure a promissory note of even date for $2,500.00, with interest at five per cent, payable at the rate of $50.00 per month, which mortgage was filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 196 at page 164. Whatever right, title, interest, claim or lien the defendant, The Development Company, Inc., may have by virtue of said mortgage is subordinate and inferior to the first lien of the note and deed of trust of the plaintiff in this cause.

10. On March 16, 1960, the defendants, Ocie A. Rogers and Florene W. Rogers, executed, acknowledged and delivered to the defendants, Lee Davis and Jeff Davis, d b a J. S. Davis & Sons Lumber Company, their mortgage on the real property hereinabove described to secure a promissory note of even date for $2,893.13, payable in 36 equal monthly installments of $80.37 each, which mortgage was filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, on March

16, 1960, where it now appears of record in Book 214 at page 511. The said mortgage provides that it is
11 given subject to the deed of trust held by the plaintiffs, hereinabove described. On March 16, 1960, the defendants, Lee Davis and Jeff Davis, partners, d/b/a J. S. Davis & Sons Lumber Company, assigned their said mortgage to the defendant, First Banecredit corporation, St. Paul, Minnesota, for stated value received, which assignment was filed for record with the recorder for the Fort Smith District of Sebastian County, Arkansas, on March 17, 1960, where it now appears of record in Book 214 at page 517. Whatever right, title, interest, claim or lien the defendants, Lee Davis and Jeff Davis, partners, d/b/a J. S. Davis & Sons Lumber Company and First Banecredit Corporation, St. Paul, Minnesota, may have by virtue of said mortgage and assignment is subordinate and inferior to the first lien of the note and deed of trust of the plaintiffs in this cause.

11. On April 18, 1960, the defendant, Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company, filed a Mechanic's Lien against the defendants, Ocie A. Rogers and Florene W. Rogers, in the sum of $446.35 for materials and labor alleged to have been furnished and used on improvements located on the real property described herein, said lien being filed with the Circuit Clerk and Recorder for the Fort Smith District of Sebastian County, Arkansas, where it now appears in Lien Book D at page 186. Whatever, right, title, interest, claim or lien the defendants, Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company may have by virtue of said Mechanic's Lien is subordinate and inferior to the first lien of the note and deed of trust of the plaintiffs in this cause.

12 12. On November 29, 1960, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien No. 10,213 against the defendant, Florene W. Rogers, Florene's House of Beauty, 102 North 17th Street, Fort Smith, Arkansas, for Withholding Taxes for the taxable period ending June 30, 1960, in the sum of $1,776.65 plus $1.00 filing fee, where it now appears of record in the office of the Circuit Clerk and Recorder for the Fort Smith Dis-

trict of Sebastian County, Arkansas in Lien Book 2 at page 457 and Mechanic's Lien Book D at page 200. On January 30, 1961, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien, No. 10,743 against the defendant, Florene W. Rogers, Florene's House of Beauty, 403 Merchants National Bank Building, Fort Smith, Arkansas, for Withholding Taxes for the taxable period ending September 30, 1960, in the sum of $1,567.14 plus $1.00 filing fee. Both of the said alleged liens are subsequent and subordinate to the lien of the plaintiffs arising from the promissory note and deed of trust hereinabove described. The United States of America is joined as a defendant in this proceeding pursuant to the provisions of 28 USCA Section 2410.

13. The defendants, The Development Company, Inc., Cecil Laughlin and James F. Taylor, Ocie A. Rogers and Florene W. Rogers, have failed to make any payments whatever on the promissory note and deed of trust of the plaintiffs for the months of October, 1960, through March, 1961, inclusive, although demand has been made for such payments, and the said defendants are now in default for principal in the sum of $15,926.98. The escrow account carried in connection with this loan is deficient in the sum of $212.93 by reason of advancements made by these plaintiffs for hazard insurance premiums and general taxes on the real property hereinabove described, and plaintiffs are entitled to judgment in this cause for such deficiency.

14. The plaintiffs elect to declare due the entire unpaid balance of said note in the amount of $15,926.98, with interest thereon from September 1, 1960, until paid at the rate of six per cent per annum, and the right of these plaintiffs to have foreclosure of said deed of trust has become absolute.

15. The plaintiff, George F. Carpenter, is merely the holder of the naked legal title to the said property for the purposes hereinbefore stated, and he has never had, nor has claimed and does not now claim to have any interest therein, or in the obligation sued on, except as Trustee for Pioneer American Insurance Company.

WHEREFORE, Pioneer American Insurance Company prays judgment against the defendants, The Development Company, Inc., Cecil Laughlin & James F. Taylor, Ocie A. Rogers and Florene W. Rogers, jointly and severally, in the amount of $15,926.98, with interest thereon from September 1, 1960 until paid at the rate of six per cent per annum, for the sum of $612.90 escrow deficiency; for a reasonable attorney's fee as provided in its said promissory note; for its costs herein expended; and for interest upon said total judgment from the date of such judgment until paid at the rate of six per cent per annum.

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The said plaintiff further prays that said judgment be declared a first lien on the property hereinbefore described; that if said judgment be not paid within a time to be fixed by the Court, that said property be sold free and clear of all liens to satisfy said judgment in the manner prescribed by law; that a Commissioner be appointed by this Court to conduct said sale, and that upon the report of said sale and the confirmation thereof by this Court, that all of the right, title, interest, lien claims, equity and or right of redemption, and dower and homestead right of each of the defendants to the said property, be foreclosed and forever barred; that the alleged liens of the defendants, The Development Company, Inc., Lee Davis and Jeff Davis, partners d/b/a J. S. Davis & Sons Lumber Company, First Bancredit Corporation, Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company, and United States of America, be adjudged subsequent and subordinate to the lien of the plaintiffs, and that their right, title, interest, lien claims and or right of redemption be determined and forever barred; and plaintiffs pray for all other relief to which they may in equity be entitled.

PIONEER AMERICAN INSURANCE COMPANY and GEORGE F. CARPENTER, Trustee, *Plaintiffs*

By: BETHELL & PEARCE

By /s/ LAWSON CLONINGER

(File endorsement omitted)

Exhibit "A" to Complaint

NOTE

Loan No. .....

$20,000.00 May 24, 1956

FOR VALUE RECEIVED, the undersigned promise(s) to pay to the order of

REPUBLIC MORTGAGE COMPANY, INC.

at its office in Fort Smith, Arkansas or at place of business of any subsequent legal holder hereof, the principal sum of Twenty Thousand and no 100 - - - - - - - ($20,000.00) Dollars payable with interest thereon at 6% per annum payable from date

This note is payable as follows: Equal installments of principal and interest in the amount of One Hundred Sixty-eight and 78 100 Dollars on the first day of July, 1956 and a like sum upon the first day of each month thereafter until said interest and principal shall have been paid in full. The one hundred and eighty installments shall be applied, first, on the payment of earned interest and the remainder on the principal.

All past due principal and or interest shall bear interest at the rate of ten per centum per annum.

If default shall be made in the payment of any installment of principal or interest on this note, then the unpaid principal of this note and all accrued interest hereon, shall, at the election of the legal holder hereof, become immediately due and payable without further notice. The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee. Every endorser hereof waives presentment for payment, notice of dishonor, protest, and notice of protest, and consents to any extensions of term of payment granted by the holder hereof.

This note is secured by a first deed of trust of even date herewith on real estate situated in City of Fort Smith

County of Sebastian State of Arkansas and designated as: Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

Witness the hand and seal of The Development Co., Inc., a corporation, by its duly authorized Officers; pursuant to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

THE DEVELOPMENT CO., INC.,
A Corporation

By: C. LAUGHLIN
Executive Vice President

Attest:
JEAN POINDEXTER
Secretary

CECIL LAUGHLIN
Cecil Laughlin, Individually

JAMES F. TAYLOR
James F. Taylor,
Individually

16 During the first five years privilege is reserved to make additional payments on the principal of the note on any interest payment date provided that such additional payments, including obligatory principal payments, shall not exceed 1 5th of the original principal sum of the note during any one year period beginning at an anniversary of the note. Further privilege is reserved to pay more than 1 5th of the principal sum in any one year upon the payment of a penalty equal to 3% of any amount in excess of said 1 5th paid during any one year. After five years from date of this note, privilege is reserved to make payments in excess of obligatory principal payments without the payment of any penalty. All prepayments shall be allowed only after 30 days written notice is given to holder of the note.

Witness the hand and seal of The Development Co., Inc., a corporation, by its duly authorized officers, pursuant

to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

THE DEVELOPMENT CO., INC.,
A Corporation

By: C. LAUGHLIN
Executive Vice President

Attest:
JEAN POINDEXTER
Secretary

CECIL LAUGHLIN
Cecil Laughlin, Individually

JAMES F. TAYLOR
James F. Taylor,
Individually

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17 **Exhibit "B" to Complaint**

ARKANSAS

#4435 DEED OF TRUST

DEVELOPMENT CO., INC.

To

REPUBLIC MORTGAGE COMPANY, INC.

This indenture, made and entered into this 24th day of May, 1956, by and between The Development Co., Inc., a Corporation party of the first part and George F. Carpenter Trustee, party of the second part, and Republic Mortgage Company, Inc., a Corporation having its principal office at Fort Smith, Arkansas, a party of the third part:

WITNESSETH, that the party of the first part in consideration of the debt and trust hereinafter mentioned and created, and the sum of One ($1.00) Dollar to us in hand paid, the receipt of which is hereby acknowledged, and the further consideration of the facts hereinafter set forth, do hereby grant, bargain, sell, transfer, and convey unto

the party of the second part, his successors in trust, and assigns forever, the following described land situated and lying in the State of Arkansas, County of Sebastian, City of Fort Smith, to wit: Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

together with all the improvements, appurtenances and privileges thereunto belonging, including all plumbing, lighting and heating fixtures now or hereafter attached to or used in connection with said premises, and all rents, issues and profits which may arise or be had thereafter, and if the property is used for business purposes, all machinery, fixtures and chattels which are used for the purpose of such business, whether attached to the freehold or not.

To Have And To Hold The Same To The Party Of The Second Part, his successors in trust, and assigns, forever.

And the party of the first part covenants with the party of the second part, his successors in trust, and assigns, that *his* is lawfully seized in fee of said premises, that the same are free and clear of all taxes, liens, and encumbrances whatsoever, that he has a good right, full power and lawful authority to convey the same, and that he will warrant and forever defend the title thereto against the lawful claims of any and all persons whatsoever.

This conveyance is made in trust, however, to secure the payment of a promissory note of even date herewith, the terms of which are incorported herein by reference, the principal sum of Twenty Thousand and no/100 Dollars, with interest from date at the rate provided in said note. The said principal and interest shall be payable at said principal office of the party of the third part, or at such other place as the holder of the note may designate in writing, as follows: Payable in one hundred and eighty equal monthly installments on the first day of each calendar month, beginning on the first day of July, 1956, each payment in the sum of One Hundred Sixty-eight and 78/100 Dollars.

In addition to the regular loan payments to principal and interest, monthly deposits shall be made equal to 1/12 of all annual taxes and special assessments and 1/36 of the 3 year hazard insurance premium.

In the event of default and foreclosure of this deed of trust, any unexpended funds in the hands of the party of the third part deposited by the party of the first part to meet the obligations of taxes, assessments and hazard insurance, shall be applied and credited by the party of the third part upon the debt hereby secured in the following order:

(1) Interest on advances made by the party of the third part;

(2) Advances made by the party of the third part;

(3) Interest on principal; and

(4) The principal debt hereby secured.

And the party of the first part, in order more fully to protect the security of this Deed of Trust, does hereby covenant and agree as follows: To pay the indebtedness, as hereinbefore provided.

Party of the first part further covenants and agrees to pay all of the taxes, assessments, rents and other Governmental or Municipal charges, fines or impositions and ground rents, whether levied or assessed upon the premises secured hereby, or upon the interest of the party of the third part therein, except in the case of the Federal or State Income Tax upon the note and deed of trust or upon the interest of the party of the third part in the same, for which provision has not been made hereinbefore, and that the party of the first part will promptly deliver the official receipts therefor to the party of the third part, and in default thereof the party of the third part shall have the right to pay the same. If the party of the first part shall fail to pay any fire or other hazard insurance premiums, or shall fail to pay for any necessary repairs, the party of the third part shall have the right to pay the same, and all sums so advanced shall be secured hereby and shall bear interest at the rate of six per centum (6%)

per annum from the date when paid. The party of the third part shall have the right to make any payment which the party of the first part should have made, and the party of the third part may also pay any other sum that is necessary to protect the security of this instrument. All such sums, as well as all costs paid by the party of the third part pursuant to this instrument, shall be secured hereby and shall bear interest at the rate of six per centum (6%) per annum from the date when any such sums are paid. Any and all sums paid by the party of the third part under the provisions of this paragraph shall, together with the interest, be repaid to the party of the third part upon demand, and upon the failure of the party of the first part to so repay such sums within thirty days after such demand, than all sums owing to the party of the third part by the party of the first part under this deed of trust and note secured hereby, shall immediately become due at the option of the party of the third part, and this deed of trust shall be subject to foreclosure.

Said party of the first part will keep the improvements now existing or hereafter erected on the said premises, insured as may be required from time to time by the party of the third part against loss by fire and other hazards, casualties, and contingencies in such amounts and for such periods as may be required by the party of the third part and will pay promptly, when due, any premiums on such insurance, provision for payment of which has not been made hereinbefore. All insurance shall be carried in companies approved by the party of the third part and the policies and renewals thereof shall be held by the party of the third part and have attached thereto loss payable clause in favor of and in form acceptable to the party of the third part. It is also agreed that in case of the pending expiration of any policy a renewal thereof with receipt for premium on same shall be delivered to the party of the third part at least ten days before time of such expiration. In event of loss the party of the first part will give immediate notice by mail to the party of the third part, who may make proof of loss if not made promptly by the party of the first part, and each insurance company concerned is hereby authorized and directed to

make payment for such loss directly to the party of the third part instead of the party of the first part and the party of the third part jointly, and the insurance proceeds, or any part thereof, may be applied by the party of
19 the third part at its option either to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In event of foreclosure of this deed of trust or other transfer of title to the said premises in extinguishment of the indebtedness secured hereby, all right, title, and interest of the party of the first part in and to any insurance policies then in force shall pass to the purchaser.

That if either the party of the second part or the party of the first part shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing to the party of the first and shall be secured by this instrument, and the note secured hereby shall, at the option of the holder, become due and collectible.

That party of the first part will keep the said premises in as good order and condition as they are now and will not commit or permit any waste thereof, reasonable wear and tear excepted.

Now Therefore, if the party of the first part shall well and truly perform all the terms and conditions of this deed of trust, and of the note secured hereby, then this conveyance shall be null and void, and shall be released or satisfied at the request of the party of the first part. If, however, there shall be a default under this deed of trust, or under the note secured hereby, then all sums owing by the party of the first part to the party of the third part under this deed of trust, or under the note secured hereby, shall immediately become due and payable at the option of the party of the third part, and the party of the second part is hereby empowered and authorized to advertise said property once a week for four consecutive weeks, giving notice of the time, place and terms of sale, in some newspaper published in the County in which said tract (or

tracts) above described is (are) located, to sell the property at public outcry to the highest and best bidder for cash. Upon such sale, the party of the second part is hereby authorized to execute and deliver a deed of conveyance in fee of said property to the purchaser thereof, and to place the purchaser in quiet and peaceful possession of the property. The party of the first part agrees that in case of any sale under this deed of trust said party of the first part will at once surrender possession of the property, and will from that moment become and be a tenant at will of the purchaser, and be removable by process, such as forcible and unlawful detainer, hereby agreeing to pay to the purchaser the reasonable rental value of the property after such sale. The party of the third part, its successors or assigns, may bid at the sale and purchase the said property, if the highest bidder therefor.

The proceeds of any sale under this deed of trust shall be applied by the party of the second part as follows:

First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, ground rents, taxes, insurance premiums, or any advances made or expenses incurred on account of the property sold, with interest thereon.

Second: To retain as compensation, a commission as set forth by the laws of the State of Arkansas.

Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing to the party of the third part or the party of the first part, pursuant to this instrument.

And last, to pay the balance, if any, to the party of the first part upon delivery and surrender to the purchaser of possession of the party sold, less the expense, if any, of obtaining possession.

Should the party of the first part apply to the bankruptcy court to be adjudicated a voluntary bankrupt, or proceedings to be instituted against said party of the first part in involuntary bankruptcy, or should any proceedings be taken against said party of the first part looking to the appointment of a receiver for the party of

the first part, that then and in either or any such case, the whole indebtedness hereby secured shall at once become due and this deed of trust shall be subject to foreclosure, at the option of the party of the third part.

The party of the third part, its assigns, or any holder of the note secured by this deed of trust may at any time, with or without cause, and at its pleasure and without notice either to the party of the second part and or party of the first part, remove the Trustee herein named and may appoint a successor by an instrument in writing which shall be recorded in the same county and State in which this instrument is recorded, and the Successor Trustee so appointed shall succeed to all rights, titles, and powers and be subject to all of the same obligations and duties, waivers and immunities, conferred upon the Trustee herein named, and no resignation, evidence of inability, or failure to function or evidence of absence of the Trustee herein named shall be required, and such like powers of substitution shall continue so long as any part of the debt secured hereby remains unpaid. It is a condition of this conveyance that the party of the first part shall retain possession of the property hereby conveyed until there is a default under this deed of trust, or under the note secured hereby, after such default, the party of the second part, or the party of the third part, shall have the right to collect the rents, issues, and profits of the property. In the event of such default, the party of the second part in addition to the power of sale as provided above, shall have the right to proceed in a court of equity to foreclosure this deed of trust and shall be entitled to the appointment of a receiver to collect the rents, issues, and profits of the property, pending such sale.

During the first five years privilege is reserved to make additional payments on the principal of the note on any interest payment date provided that such additional payments, including obligatory principal payments, shall not exceed 1 5th of the original principal sum of note during any one year period beginning at an anniversary of the date. Further privilege is reserved to pay more than 1/5th of the principal sum in any one year upon the payment of a penalty equal to 3% of any amount in excess of said 1 5th paid during any one year. After five years from

date of this note, privilege is reserved to make payments in excess of obligatory principal payments without the payment of any penalty. All prepayments shall be allowed only after 30 days written notice is given to holder of the note.

Witness the hand and seal of The Development Co., Inc., a corporation, by its duly authorized officers, pursuant to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

(SEAL) THE DEVELOPMENT CO., INC.,
A Corporation

By: C. LAUGHLIN
Executive Vice President

Attest:

JEAN POINDEXTER
Secretary

The party of the first part hereby waive all right of appraisement, sale, homestead, or redemption allowed under any law or laws of the State of Arkansas, and especially under the Act of the General Assembly of the State of Arkansas approved May 8, 1899. The party of the first part also waive any defense to the note herein described that may based upon any extension of time of payment thereof to any person who subsequently assumes or becomes liable for the payment of the indebtedness herein described, regardless of whether said extension is granted with or without the knowledge or consent of the party of the first part.

21 The covenants herein contained shall bind, and the benefits and advantages shall inure to the respective heirs, executors, administrators, successors and assigns of the parties hereto. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

Witness the hand and seal of The Development Co., Inc., a Corporation, by its duly authorized officers, pursuant

to a resolution of the Board of Directors of said corporation passed at a duly called and held meeting, this 24th day of May, 1956.

(SEAL) THE DEVELOPMENT CO., INC.,
A Corporation

By: C. LAUGHLIN
Executive Vice President

Attest:

JEAN POINDEXTER, *Secretary*

STATE OF ARKANSAS
COUNTY OF SEBASTIAN } ss

On this 24th day of May, 1956, before me the undersigned a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person the within-named C. Laughlin and Jean Poindexter, to me personally well known, who stated that they were the Executive Vice President and Secretary of The *Developement* Co., Inc., a corporation, and were duly authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 24th day of May, 1956.

(SEAL) NYLAH ERKE
Notary Public

My Commission expires: 9-19-59

Filed for record this 7th day of June 1956, at 3:31 o'clock P. M.

PAUL P. PACE
Clerk & Ex-Officio Recorder

By SUE SPRINGWATER D.C.

22 **Exhibit "C" to Complaint**

5296

ASSIGNMENT OF DEED OF TRUST

REPUBLIC MORTGAGE COMPANY, INC.

To

PIONEER AMERICAN INSURANCE CO.

STATE OF ARKANSAS)
COUNTY OF SEBASTIAN) ss

KNOW ALL MEN BY THESE PRESENTS: That the undersigned Republic Mortgage Company, Inc., of Fort Smith, Arkansas, a corporation organized and existing under the laws of Arkansas, for value received, does grant, bargain, sell, convey and assign unto Pioneer American Insurance Company, Fort Worth, Texas all its right, title, and interest in and to a certain deed of trust executed to it by The Development Company, Inc., a Corporation and recorded in Book 186, Page 490, in the Circuit Clerk's Office of Sebastian County, Arkansas, together with the debt secured thereby, the property encumbered by said deed of trust being briefly described, to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

Without recourse against said Republic Mortgage Company, Inc., of Fort Smith, Arkansas, except as follows:

The undersigned Republic Mortgage Company, Inc., warrants that there remains unpaid on the note secured by said deed of trust and assigned by this instrument the principal sum of Nineteen Thousand Nine Hundred Thirty One and 22/100 Dollars, plus interest at the rate of *of* Six per cent (6%), per annum, from the 1st day of July, 1956, and further warrants to and covenants with Pioneer American Insurance Company, Assignee herein, that it has not, at any time, released any portion of the indebtedness, or released, altered or impaired the personal liabili-

ties of any party to the note described, or in any manner released, altered, or impaired any of the covenants or agreements of said deed of trust and note, and that, to its best knowledge and belief, there are no defenses, offsets, or counterclaims to the said indebtedness or to the note evidencing the same or to the aforesaid deed of
23 trust; and that it has never been a party plaintiff or defendant in litigation of any nature affecting said mortgage loan or indebtedness.

IN WITNESS WHEREOF, the said Republic Mortgage Company, Inc., has caused this instrument to be signed by C. Laughlin, its President, and attested by Jean Poindexter, Secretary, and its Corporate Seal to be hereto affixed this 27th day of July, 1956.

REPUBLIC MORTGAGE COMPANY, INC.

(SEAL) By C. LAUGHLIN
C. Laughlin, *President*

Attest:

JEAN POINDEXTER
Jean Poindexter, *Secretary*

STATE OF ARKANSAS)
COUNTY OF SEBASTIAN) ss

On this 27th day of July, 1956, before me, the undersigned a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person the within named C. Laughlin and Jean Poindexter to me personally well known, who stated that they were the President and Secretary of the Republic Mortgage Company, Inc., and were fully authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this the 27th day of July, 1956.

(SEAL) NYLAH ERKE
Notary Public

Commission expires:
9-19-59

Filed for record on this the 7th day of August, 1956, A. D., at 2:11 o'clock P.M.

PAUL P. PACE
Clerk and Ex-Officio Recorder
By SUE SPRINGWATER D.C.

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40 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

(Title omitted)

Separate Answer of United States of America

Comes now the United States of America and for its separate Answer states:

1. Defendant admits the execution of the plaintiff's note and mortgage but denies the lien of the same is prior to lien of the United States of America as applied to taxes and insurance paid subsequent to the filing of the liens hereinafter described and as to attorneys fees.

2. Defendant, United States of America, further shows that on November 29, 1960, pursuant to law, Notice of Federal Tax Lien No. 10,213 was filed against the defendant Florene W. Rogers for withholding taxes for the period ending June 30, 1960, in the sum of $1,776.65, plus $1.00 filing fee, and there remains due for the withholding taxes for said period the sum of $1,608.62 plus interest at the rate of 6% per annum from September 2, 1960.

3. Defendant, United States of America, further
41 shows that on January 30, 1961, through its agents filed Federal Tax Lien No. 10,743 against the defend-

ant Florene W. Rogers in the amount of $1,567.14, plus $1.00 filing fee, for non-payment of withholding tax for the period ending September 30, 1960, and there is now due on said taxes the sum of $1,562.53, plus interest from October 31, 1960, until paid.

WHEREFORE, the defendant United States prays that priority be established and in the event of sale at foreclosure of the property involved in an amount in excess of the principal and interest of plaintiff's note and mortgage that the balance be impounded in the registry of the court pending an order of determining the parties, or parties, entitled to, and such other relief to which it might be entitled.

UNITED STATES OF AMERICA

CHAS. W. ATKINSON
United States Attorney

By /s/ ROBERT E. JOHNSON
Robert E. Johnson
Assistant U. S. Attorney

CERTIFICATE
(Omitted in printing)

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61 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS
FOR SMITH DISTRICT

No. 570

PIONEER AMERICAN INSURANCE COMPANY and GEORGE F. CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE COMPANY, *Plaintiffs*

vs.

THE DEVELOPMENT COMPANY, INC., a corporation; CECIL LAUGHLIN; JAMES F. TAYLOR; OCIE A. ROGERS and FLORENE W. ROGERS; LEE DAVIS and JEFF DAVIS, partners d/b/a J. S. Davis & Sons Lumber Company; First Banceredit Corporation; ALFRED J. ANDERSON d/b/a Anderson Plumbing & Heating Company; UNITED STATES OF AMERICA, GALEN F. SCHLUND and ART LUNDREN; and ARKANSAS SCHOOL OF COSMETOLOGY, INC., *Defendants*

THE DEVELOPMENT COMPANY, INC., a corporation, *Cross Claimant*

Answer and Cross Complaint—Filed June 20, 1961

Comes now The Development Company, Inc. and for response to the complaint of the plaintiff, alleges and states as follows:

1. Admits the allegations of the complaint.

2. Admits the allegations of the amendment to complaint, joining Galen F. Schlund as defendant.

3. Admits the allegations of the amendment to complaint, joining Art Lundren as defendant.

Further pleading, The Development Company, Inc., for its cross-complaint against the defendants Ocie A. Rogers and Florene W. Rogers; Lee Davis and Jeff Davis,
62 partners d/b/a J. S. Davis & Sons Lumber Company; First Banceredit Corporation; Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company; United States of America; Galen F. Schlund; Arkansas School of Cosmetology, Inc. and Art Lundren, alleges and states as follows:

4. On March 4, 1958, the defendants Ocie A. Rogers and Florene W. Rogers became indebted to The Development Company, Inc. in the amount of $2,500.00, evidenced by their promissory note for that amount, with interest at the rate of five per cent per annum, payable at $50.00 per month beginning March 1, 1958. A copy of said note is attached hereto, made a part hereof, and marked Exhibit "A".

5. To secure the payment of said note, the defendant Ocie A. Rogers and Florene W. Rogers on March 4, 1958, executed, acknowledged and delivered to The Development Company, Inc., their mortgage on the following described real property:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

Said mortgage was filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 196 at page 164.

6. In said mortgage the defendants Ocie A. Rogers and Florene W. Rogers waived any and all rights of redemption and or appraisement under the laws of the State of Arkansas. A copy of said mortgage with power of sale is attached hereto, made a part hereof, and marked Exhibit "B".

63 7. Under the terms of said note and mortgage, the defendants Ocie A. Rogers and Florene W. Rogers agreed to make monthly payments of principal and interest in the amount of $50.00 per month beginning March 4, 1958. The mortgage provides that if the grantor shall fail to pay the indebtedness secured at the time and in the manner provided, the grantee or its assigns shall have the right and power to foreclose the lien of said mortgage.

8. The defendants Ocie A. Rogers and Florene W. Rogers made certain payments on said note reducing the principal due to $1,846.50, but said defendants have failed and neglected to make payments of installments due August 4, 1959, and thereafter to this date, although demand therefor has been made, and the said defendants are now

in default since August 4, 1959, and in fact said defendants were delinquent in making payments up to August 4, 1959, and the entire unpaid principal balance in the net amount of $1,846.50 is now due, together with interest on said balance in the amount of $180.07 as of May 12, 1961.

9. Cross-claimant adopts the allegations of paragraph 10 of plaintiff's complaint, alleging the execution by defendant Ocie A. Rogers and Florene W. Rogers of a real estate mortgage to Lee Davis and Jeff Davis, d/b/a J. S. Davis & Sons Lumber Company, and allege that said mortgage is subordinate and inferior to the rights of cross-claimant.

10. Cross-claimant adopts the allegations of paragraph 11 of the plaintiff's complaint, alleging the filing of a mechanic's lien against the defendants Ocie A. Rogers and Florene W. Rogers by Alfred J. Anderson, d/b/a Anderson Plumbing & Heating Company, and alleges that said mechanic's lien is subordinate and inferior to the rights of the cross-claimant.

64

11. Cross-claimant adopts the allegations of paragraph 12 of plaintiff's complaint, namely that on November 29, 1960, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien No. 10,213 against the defendant Florene W. Rogers, Florene's House of Beauty, 102 North 17th Street, Fort Smith, Arkansas, for withholding taxes for the taxable period ending June 30, 1960, in the sum of $1,776.65 plus $1.00 filing fee, where it now appears of record in the office of the Circuit Clerk and Recorder for the Fort Smith District of Sebastian County, Arkansas in Lien Book 2 at page 457 and Mechanic's Lien Book D at page 200. On January 30, 1961, the U. S. Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed its Notice of Federal Tax Lien, No. 10743, against the defendant, Florene W. Rogers, Florene's House of Beauty, 403 Merchants National Bank Building, Fort Smith, Arkansas, for withholding taxes for the taxable period ending September 30, 1960, in the sum of $1,567.14 plus $1.00 filing fee. Additionally, cross-claimant states that on April 14, 1961, the United States Treasury Department, District Director of Internal Revenue, Little Rock, Arkansas, filed

its Notice of Federal Tax Lien No. 11,214 against the
65 defendant Florene W. Rogers, Florene's House of Beauty, 403 Merchants National Bank Building, Fort Smith, Arkansas, for withholding taxes for the taxable period ending December 31, 1960, in the sum of $1,288.96 plus $1.00 filing fee, where it now appears of record in the office of the Circuit Clerk and Recorder for the Fort Smith District of Sebastian County, Arkansas, in Lien Book 2 at page 487 and Mechanic's Lien Book D at page 210. All of such tax liens set forth above are all subsequent and subordinate to the lien of the cross-claimant arising from the promissory note and mortgage hereinabove described. The United States of America is joined as a cross-defendant in this cross-claim pursuant to the provisions of 28 USCA Section 2410.

12. Cross-claimant adopts the allegations of the first amendment to plaintiff's complaint, joining Galen F. Schlund, d b a Arkansas School of Cosmetology, as a defendant. The cross-claimant further alleges that whatever right, title, interest or lease, that the said Galen F. Schlund, d b a Arkansas School of Cosmetology, may have in the real property described in paragraph 5 of this cross-complaint, is subordinate and inferior to the rights of the cross-claimant. Cross-claimant further states that Arkansas School of Cosmetology, Inc., an Arkansas corporation, is now in possession of the real property described in paragraph 5 of this cross-complaint, or else has a contract for possession thereof. The lease of Galen F. Schlund has been assigned to said Arkansas School of Cosmetology,
Inc., or else will be assigned to said corporation
66 pursuant to an agreement between said corporation and Galen F. Schlund. The cross-claimant further alleges that whatever right, title, interest, or lease, that the said Arkansas School of Cosmetology, Inc. may have in the real property described in paragraph 5 of this cross-complaint, or may hereafter acquire in said property, is subordinate and inferior to the rights of the cross-claimant.

13. Cross-claimant adopts the allegations of the second amendment to the plaintiff's complaint, alleging the filing of a mechanic and materialman's lien against the defendants Ocie A. Rogers and Florene W. Rogers by Art Lundren,

and alleges that said mechanic's lien is subordinate and inferior to the rights of the cross-claimant:

WHEREFORE, cross-claimant, The Development Company, Inc. prays judgment against the defendants Ocie A. Rogers and Florene W. Rogers, jointly and severally, in the amount of $1,846.50 with interest thereon in the amount of $180.07 as of may 12, 1961, and thereafter at the rate of five per cent per annum until judgment; for its costs herein expended; and for interest upon said total judgment from the date of such judgment until paid at the rate of six per cent per annum.

The said cross-claimant further prays that said judgment be declared a lien on the property hereinbefore described; that such lien be decreed to be subject and subordinate only to the lien of the plaintiff, Pioneer American Insurance Company, and prior and paramount to all right, title,
67 claim, interest, equity, or right of redemption, or right of dower and homestead, of the cross-defendants or any one of them; that if the judgment of this court in favor of the cross-claimant not be paid within a reasonable time, that a commissioner be appointed to sell the property herein described, or so much thereof as may be necessary to satisfy the cross-claimant's judgment; that if the proceeds of the same be not sufficient to satisfy such judgment, that the cross-claimant have judgment against the defendants Ocie A. Rogers and Florene W. Rogers in personam; that all the rights of the defendants Lee Davis and Jeff Davis, partners d/b/a J. S. Davis & Sons Lumber Company; First Bancredit Corporation; Alfred J. Anderson d/b/a Anderson Plumbing & Heating Company; United States of America; Galen F. Schlund; Art Lundren, and Arkansas School of Cosmetology, Inc. be foreclosed and forever barred, and for all other relief to which it may be entitled in the premises.

THE DEVELOPMENT COMPANY, INC.

By /s/ JAMES F. TAYLOR, *V. Pres.*

(File endorsement omitted)

ARKANSAS NOTE

FORT SMITH, ARK.

years after date, I promise to pay

Development Company, Inc.

and no/100

Fort Smith, Arkansas without relief from valuation or appraisement

until paid and at the rate of 8 per cent per annum

Chris T. Rogers

Florence P. Rogers

Exhibit "A" to Answer

Printed and for Sale by Calvert-Moffitt Printing Company, Fort Smith, Arkansas

MORTGAGE---With Power of Sale

Know All Men by These Presents: That we Ocie A. Rogers and Florene W. Rogers, his wife, MORTGAGORS, of the County of Sebastian, State of Arkansas, for and in consideration of the sum of One Dollar and other valuable considerations ----------DOLLARS in us in hand paid by The Development Company, Inc. of Fort Smith, in the State of Arkansas, MORTGAGEE, the receipt whereof is hereby acknowledged, have Granted, Bargained and Sold, and do hereby Grant, Bargain, Sell and Convey unto the said MORTGAGEE and unto its ~~XXXX~~/successors and assigns the following described Real Estate, situate in Sebastian County, State of Arkansas, and in City of Fort Smith, to-wit:

Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Arkansas

TO HAVE AND TO HOLD the same unto the said MORTGAGEE and unto its ~~XXXX~~/successors and assigns forever, with all the privileges and appurtenances thereto belonging.

And We, the said MORTGAGORS, for our heirs, executors, administrators and assigns, covenant with the said MORTGAGEE, its ~~XXXX~~/successors and assigns, that We are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances, that We have good right to sell and convey the same to the said MORTGAGEE as aforesaid, and that We will and our heirs, executors and administrators shall forever warrant and defend the title to the said Real Estate against all lawful claims and demands whatever.

(69)

And I, the said Florene W. Rogers, wife of the said Ocie A. Rogers, for and in consideration of said sum of money, do hereby join in this conveyance, and for the consideration aforesaid do hereby release and quitclaim, transfer and relinquish unto said MORTGAGEE and unto its heirs/successors and assigns, all my right, claim or possibility of dower and homestead in or to said lands.

TO HAVE AND TO HOLD the same unto the said MORTGAGEE and unto its ~~XXXX~~ successors and assigns forever, with all the privileges and appurtenances thereto belonging.

And WE, the said MORTGAGORS, for our heirs, executors, administrators and assigns, covenant with the said MORTGAGEE, its ~~XXXX~~ successors and assigns, that WE ARE lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances, that WE have good right to sell and convey the same to the said MORTGAGEE as aforesaid, and that WE will and OUR heirs, executors and administrators shall forever warrant and defend the title to the said Real Estate against all lawful claims and demands whatever.

And I, the said Florene W. Rogers, wife of the said Ocie A. Rogers, for and in consideration of said sum of money, do hereby join in this conveyance, and for the consideration aforesaid do hereby release and quitclaim, transfer and relinquish unto said MORTGAGEE and unto its ~~XXXX~~ successors and assigns, all my right, claim or possibility of dower and homestead in or to said lands.

The foregoing conveyance is on condition: That, Whereas, the said MORTGAGORS are justly indebted to the said MORTGAGEE in the sum of Two Thousand Five Hundred and no/100---------- DOLLARS for value received evidenced by one note of even date in the amount of $2,500.00 and bearing interest at 5%. Said note being payable at $50.00 per month beginning March 1, 1958

Now, if the said MORTGAGORS shall pay or cause said indebtedness to be paid, with interest, according to the terms thereof, and all other indebtedness of the MORTGAGORS to the MORTGAGEE, then this instrument to be null and void; otherwise to remain in full force and effect.

AND IT IS HEREBY FURTHER STIPULATED, that during the continuance of this instrument in force, the said MORTGAGORS shall at all times keep the State, County and City taxes and assessments for local improvements on said premises fully paid as required by law, and shall keep the buildings on said premises insured in some approved fire insurance company, or companies, against loss or damage by fire, or storm, with extended coverage, in a sum of not less than with Standard Mortgage Clause, providing that the loss, if any, shall be payable to the MORTGAGEE, or the Legal holder of said indebtedness, as their interest may appear.

AND IT IS FURTHER STIPULATED, that in case the MORTGAGORS shall make default in payment of taxes, or assessments for local improvements or other purposes, or fail to keep the premises insured as above provided, then the said MORTGAGEE or the legal holder hereof may pay such taxes and assessments, or procure such insurance, and the amount expended thereby, with interest at ten per cent per annum from date of such expenditure until repaid, shall be considered a sum the repayment of which is intended to be hereby secured.

And if default be made in payment of the indebtedness hereby secured, or any installment due under the terms thereof, at maturity, or of any interest payment when due, or the taxes aforesaid, or any part of either, or if waste be committed on or improvements are removed from the land without written consent of the MORTGAGEE or assigns, or if the MORTGAGORS become insolvent, then, in any or either of such events, the whole of the sums intended to be hereby secured shall at the option of the MORTGAGEE hereto, or the legal holder of said indebtedness, become immediately due and payable, and the MORTGAGEE, or the legal holder of said indebtedness, without notice or demand, may proceed to foreclose this mortgage.

All right of appraisement and redemption provided by the laws of Arkansas are hereby waived by the MORTGAGORS.

IN WITNESS WHEREOF the MORTGAGORS have hereunto set their hands and private seals this 28th day of March, A. D. 58

Ocie A. Rogers (SEAL)

Florene W. Rogers (SEAL)

(SEAL)

(69) Exhibit "B" to Answer

28

ACKNOWLEDGMENT

STATE OF ARKANSAS
County of Sebastian } ss.

On this 4th day of March, 19 58, before me, the undersigned notary public within and for the County of Sebastian in the State of Arkansas, duly commissioned and acting, appeared in person Ocie A. Rogers and Florene V. Rogers to me personally well known as the person s whose name s appear s upon the within and foregoing mortgage as the part ies grantor s and stated that t he y had executed the same for the consideration and purpose therein mentioned and set forth, and I do so certify.

And I further certify that on the same day voluntarily appeared before me Florene V. Rogers wife of the said Ocie A. Rogers to me well known to be the person whose name appears upon the within and foregoing mortgage, and, in the absence of her said husband, stated and declared that she had of her own free will executed the same and had signed the relinquishment of dower and homestead therein expressed, for the purposes and consideration therein contained and set forth, without compulsion or undue influence of her said husband.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office as such Notary public

[illegible] County and State aforesaid, on this 4th day of March, 19 58

My Commission expires October 14, 19 60

Lottye Schultz

CERTIFICATE OF RECORD

STATE OF ARKANSAS
County of Sebastian } ss.

I, Otis O. Harris, Jr, Circuit Clerk and ex-Officio Recorder of the County aforesaid do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 18 day of March, A. D. 19 58 at 8:06 o'clock A M., and the same is now duly recorded with the acknowledgments and certificates thereon, in "Record Book 158," page

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 18 day of March, A. D. 19 58

OTIS O. HARRIS, JR
Circuit Clerk and ex-Officio Recorder

By [illegible]
Deputy Clerk

CERTIFICATE OF RECORD.

STATE OF ARKANSAS
County of Sebastian } ss.

I, Otis O. Harris, Jr Circuit Clerk and ex-Officio Recorder of the County aforesaid do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 18 day of March, A. D. 19 58, at 8:06 o'clock A M., and the same is now duly recorded with the acknowledgments and certificates thereon, in "Record Book 158," page ____

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 18 day of March A. D. 19 58

OTIS O. HARRIS, JR
Circuit Clerk and ex-Officio Recorder

By [signature]
Deputy Clerk

2807-196-
2807

REAL ESTATE MORTGAGE
With Power of Sale

Ocie A. Rogers
Florence W. Rogers
TO
The Development Company, Inc.

Filed for record on this 18 day of March, 19 58 at 8 o'clock 06 minutes A M.
Recorded in ____
Page ____
[signature]
Clerk and ex-Officio Recorder
By ____ D. C.

(TL)

FOR VALUE RECEIVED ____
the within-named mortgagee____, do____ hereby sell, assign and transfer to ____
this mortgage and the notes secured herein, without recourse on ____

Assignment endorsed on record ____ 19____

SATISFACTION

The note____ herein described, having been paid in full, this mortgage is hereby released and the lien thereby created discharged.

WITNESS____ hand ____ day of ____ 19____

Release endorsed on record ____ 19____

95 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

Separate Answer of United States to Cross Complaint—Filed July 11, 1961

Comes now the defendant, United States of America, and for its separate answer to the Cross-Complaint of the Development Company states:

1. That not having information on which to form a belief denies all of the allegations not herein specifically admitted.

2. The defendant, Unted States, admits allegations in Paragraph 11 of the Cross-Complaint of the Development Company and states that said withholding tax remains wholly unpaid.

WHEREFORE, the defendant, United States of America, prays that in event of foreclosure and sale the proceeds of the sale be impounded in the registry of the Court pending proper determination of the ownership of the proceeds thereof.

UNITED STATES OF AMERICA,
CHAS. W. ATKINSON
United States Attorney

By /s/ ROBERT E. JOHNSON
Robert E. Johnson
Assistant U. S. Attorney

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96 CERTIFICATE OF SERVICE
(omitted in printing)

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97 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

Answer of Ocie A. Rogers and Florene W. Rogers—Filed July 12, 1961

Comes Ocie A. Rogers and Florene W. Rogers and for their answer to all the pleadings in this matter directed

toward them, and with the intent to answer each and every material allegation contained in each and every pleading directed toward them, state and allege:

I

They deny each and every material allegation contained in each and every pleading directed toward them as specifically as if said denials were set out herein word for word.

WHEREFORE, premises considered, Ocie A. Rogers and Florene W. Rogers prays that each and every pleading directed toward them be dismissed and that each of said pleaders take nothing and that these defendants recover their costs expended herein, together with such other relief, both equitable and proper, to which they may be entitled.

/s/ CHAS. R. GARNER
Charles R. Garner
Attorney for Ocie A. Rogers and Florence W. Rogers

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98 CERTIFICATE OF SERVICE
(omitted in printing)

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105 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

Pre-Trial Order—September 7, 1961

On this the 7th day of September, 1961, a pre-trial conference was held in Chambers, the plaintiffs and the defendant The Development Company, Inc. appearing by their attorneys, Bethell & Pearce, and the defendants Ocie A. Rogers and Florene Rogers by their attorney, Charles R. Garner, the defendant James F. Taylor pro se, the defendant Anderson Plumbing & Heating Company by its attorney, Franklin Wilder, the defendant Galen F. Schlund d/b/a Arkansas School of Cosmetology, by his attorney, Ed Bedwell, the defendant United States of America by

Robert Johnson, Assistant United States Attorney, the defendant Art Lundren, by his attorney, Finis F. Batchelor, Jr. The defendants Lee Davis and Jeff Davis, partners, d/b/a J. S. Davis & Sons Lumber Company, First
106 Bancredit Corporation appear not, either in person or by attorney, although duly served with process in the manner and form required by law, and are hereby adjudged in default.

The suit is for foreclosure of a first and second mortgage and the question is priority of claims and liens.

The United States of America claims $1,608.62 plus interest for withholding taxes for the period ending June 30, 1960; also, lien for period ending September 30, 1960. The lien was filed January 30, 1961. The Government admits that these liens are subordinate to the first and second mortgages, but claim it is not subordinate to advances or attorney fees, and agree to submit brief on this question within ten (10) days from the date of this order; plaintiffs and defendants have five (5) days for reply.

Alfred J. Anderson filed his lien March 18, 1960, claiming a balance due of $206.00 for lien period January 1, 1959 to March 19, 1960. It was agreed and stipulated that this lien is subordinate to first and second mortgages.

Art Lundren filed his lien May 2, 1961 claiming $5,688.18 for lien period March 28, 1958 to April 3, 1961. This lien is disputed by Ocie and Florene Rogers. It was stipulated and agreed that it was subordinate and inferior to the first and second mortgages.

It was stipulated between plaintiffs and defendants Ocie A. Rogers and Florene Rogers that the first and second mortgages were duly executed by them, and the dates
107 and amounts set out therein are not denied. They admit the lien of Anderson Plumbing & Heating Company, but deny the claim in toto of Art Lundren.

On July 24th, 1959, the plaintiff filed a motion to strike the answer of Ocie A. and Florence Rogers. This motion was withdrawn in open Court by plaintiffs and defendant The Development Company, Inc.

Defendant Galen F. Schlund, lessee, claims no interest in the property. He has sub-let the premises to Idell Jones, who pays rent to the receiver.

This cause is to be set for trial on the merits by agreement of the parties.

/s/ HUGH M. BLAND
Chancellor

(Recorded in Chancery Court Record Vol. 26 at page 436.)

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110 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

(Title Omitted)

Amendment to Answer—Filed November 9, 1961

Comes now the United States of America and for its Amendment to its Answer heretofore filed states:

1. It adopts the Answer as filed including all the allegations thereto.

2. Since the filing of this lawsuit, the District Director has filed the following liens:

a. On April 16, 1961, Federal Tax Lien in the principal sum of $1288.96 upon which there is due through November 9, 1961, the sum of $1344.69.

b. On July 17, 1961, tax lien for unpaid withheld tax was filed in the principal sum of $1606.87 upon which there is now due the sum of $1653.23.

c. On October 3, 1961, tax lien for unpaid withheld tax in the sum of $1148.69 upon which there is now due $1164.04.

3. The defendants, Ocie A. Rogers and Florene W. Rogers, have unpaid tax liens totaling $6,482.66 as of this date.

111 WHEREFORE, defendant, United States, prays as in the original Answer.

UNITED STATES OF AMERICA
CHAS. W. ATKINSON
United States Attorney

By /s/ ROBERT E. JOHNSON
Robert E. Johnson
Assistant U. S. Attorney

(File Endorsement Omitted)

CERTIFICATE OF DELIVERY

(omitted in printing)

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112 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

No. 570

PIONEER AMERICAN INSURANCE COMPANY AND GEORGE F. CARPENTER, Trustee for PIONEER AMERICAN INSURANCE COMPANY, *Plaintiffs*

v.

THE DEVELOPMENT COMPANY, INC., A CORPORATION, CECIL LAUGHLIN, JAMES F. TAYLOR, OCIE A. ROGERS AND FLORENE W. ROGERS, HUSBAND AND WIFE, LEE DAVIS AND JEFF DAVIS, PARTNERS DOING BUSINESS AS J. S. DAVIS & SONS LUMBER COMPANY, FIRST BANCREDIT CORPORATION, A CORPORATION, ALFRED J. ANDERSON DOING BUSINESS AS ANDERSON PLUMBING & HEATING COMPANY, UNITED STATES OF AMERICA, GALEN F. SCHLUND, ART LUNDREN, ARKANSAS SCHOOL OF COSMETOLOGY, INC., *Defendants*

THE DEVELOPMENT COMPANY, INC., A CORPORATION, ALFRED J. ANDERSON DOING BUSINESS AS ANDERSON PLUMBING & HEATING COMPANY, UNITED STATES OF AMERICA, AND ART LUNDREN, *Cross-Complainants*

Decree—November 9, 1961

On this 9th day of November, 1961, this cause came on for hearing upon the complaint, as amended, of the plain-

tiffs; the answer and cross-complaint of The Development Company, Inc.; the answer and cross-complaint of Alfred J. Anderson; the answers and cross-complaints of United States of America; the answer and cross-complaint, and response of Art Lundren; the answer of James F. Taylor; the answer of Ocie A. Rogers and Florene W. Rogers, husband and wife; the answer of Galen F. Schlund; and the report of Verdon Bennett, Receiver heretofore appointed by the Court. The following deefndants appeared
113 not, but wholly made default: Cecil Laughlin; Lee Davis and Jeff Davis, partners doing business as J. S. Davis & Sons Lumber Company; First Bancredit Corporation; and Arkansas School of Cosmetology, Inc.

Appearance at the hearing were as follows: Plaintiffs by their attorneys, Bethell & Pearce and Donald P. Callaway; defendant and cross-complaintant, The Development Company, Inc., by its duly authorized officers and its attorneys, Bethell & Pearce and Donald P. Callaway; defendant James F. Taylor pro se; defendants Ocie A. Rogers and Florene W. Rogers in person and by their attorney, Charles R. Garner; defendant and cross-complainant Alfred J. Anderson in person and by his attorney, Franklin Wilder; defendant and cross-complainant United States of America by Robert E. Johnson, Assistant Unted States Attorney; defendant Galen F. Schlund in person and by his attorney, Edward E. Bedwell; defendant and cross-complainant Art Lundren in person and by his attorney, Fines Batchelor, Jr.

The Court finds that the following defendants have been duly served in person with process for the time and in the form and manner required by law: The Development Company, Inc.; James F. Taylor; Ocie A. Rogers and Florene W. Rogers; Lee Davis and Jeff Davis, Partners doing business as J. S. Davis & Sons Lumber Company; Alfred J. Anderson; United States of America; Galen F. Schlund; Art Lundren; and Arkansas School of Cosmetology, Inc. The Court finds that the following defendants have been duly served constructively (by publica-
114 tion) for the time and in the form and manner required by law, report of the attorney ad litem having been in each case duly filed: Cecil Laughlin; First Bancredit Corporation.

The cause was heard upon the pleadings before the Court and the evidence and exhibits produced in open Court, from all of which the Court finds as follows:

1. The Court has jurisdiction of the parties and the subject matter of this cause.

2.a. On May 24, 1956, the defendants, The Development Company, Inc., a corporation, Cecil Laughlin and James F. Taylor, became indebted to Republic Mortgage Company, Inc. a corporation, in the amount of $20,000.00, evidenced by their promissory note for that amount, with interest at the rate of six per cent per annum, payable in equal monthly installments of principal and interest in the amount of $168.78, beginning July 1, 1956, and a like sum upon the first day of each month thereafter until said interest and principal shall have been paid in full.

b. To secure the payment of said note the defendant, The Development Company, Inc., executed and delivered to George F. Carpenter, Trustee for Republic Mortgage Company, Inc., its deed of trust dated May 24, 1956, wherein it conveyed to George F. Carpenter, as Trustee for Republic Mortgage Company, Inc., the following real property situated in the City of Fort Smith, Sebastian County, Arkansas, to-wit:

115 Lots 5 and 6 in Block 83 of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas.

c. Said deed of trust was duly acknowledged, and was on June 7, 1956, filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, and now appears of record in Book 186 at page 490.

d. In said deed of trust the defendant, The Development Company, Inc., waived any and all rights of redemption and/or appraisement under the Laws of the State of Arkansas.

e. Under the terms of said note and deed of trust, the said defendant, The Development Company, Inc., Cecil Laughlin and James F. Taylor agreed to make monthly payments of principal and interest in the amount of $168.78, and in addition thereto agreed to pay monthly one-twelfth of the annual taxes and special assessments and one/thirty-

sixth of the 3-year hazard insurance premium, subject to such adjustments as might be necessary to meet the payments as they fell due.

f. Under the terms of said deed of trust it is provded that if the grantor fails to pay interest on said note when due, or fails to make payments on principal, hazard insurance, taxes or special assessments when due, then at the option of the grantee, all of the indebtedness secured by said deed of trust shall become due for all purposes and the Trustee may proceed to sell the property, or to foreclose the said deed of trust in any court of competent jurisdiction.

116 g. On July 27, 1956, Republic Mortgage Company, Inc. endorsed said note and assigned said deed of trust for value received to plaintiff, Pioneer American Insurance Company, Fort Worth, Texas, the assignment having been duly acknowledged and filed for record in the office of the recorder for the Fort Smith District of Sebastian County, Arkansas, on August 7, 1956, where it now appears of record in Book 190 at page 10.

h. On March 4, 1958, the defendant, The Development Company, Inc., executed, acknowledged and delivered to defendants, Ocie A. Rogers and Florene W. Rogers, husband and wife, its corporation deed to the real property described above, which deed was filed for record in the office of the Recorder for the Fort Smith District of Sebastian County, Arkansas, on March 18, 1958, where it now appears of record in Book 158 at page 255. Said deed provides that it is given subject to the deed of trust held by the plaintiffs, hereinabove described, and the grantees assumed and agreed to pay the unpaid balance due thereunder.

i. Defendants, The Development Company, Inc., Cecil Laughlin, James F. Taylor, Ocie A. Rogers and Florene W. Rogers, have failed to make any payments on the promissory note and deed of trust of the plaintiffs for the months of October, 1960, and thereafter, although demand has been made for such payments, and the said defendants are now in default for same. Plaintiff has elected to de-

clare the entire unpaid balance of said note due and
117 payable. The principal amount thereof is $15,926.98;
advancements by plaintiff for hazard insurance premiums and general taxes on the real property hereinabove described, net of all amounts in the escrow account carried by plaintiff in connection with this loan, amount to $430.66; interest on the principal to the date of hearing amounts to $1,059.15; and interest on the advancements to the date of hearing amounts to $23.08; making a total due plaintiff from said defendants of $17,439.87. Plaintiff's right to have foreclosure of the deed of trust has become absolute, and plaintiff is entitled to judgment against said defendants for such amount of $17,439.87.

j. Plaintiff, George F. Carpenter, is merely the holder of the maked legal title to the property aforesaid for the purposes hereinbefore stated, and he has never had and does not now have any interest therein or in the obligation sued on, except as Trustee for Pioneer American Insurance Company.

3.a. On March 4, 1958, the defendants, Ocie A. Rogers and Florene W. Rogers, became indebted to the Development Company, Inc., in the amount of $2,500.00, evidenced by their promissory note for that amount, with interest at the rate of 5% per annum, payable at the rate of $50.00 per month beginning March 1, 1958.

b. To secure the payment of said note, defendants, Rogers, on March 4, 1958, executed, acknowledged and delivered to The Development Company, Inc. their mortgage on the real property above described, which mortgage
was filed for record in the office of the Recorder
118 for the Fort Smith District of Sebastian County,
Arkansas, on March 18, 1958, where it now appears of record in Book 196 at page 164.

c. In said mortgage the defendants, Ocie A. Rogers and Florene W. Rogers, waived any and all rights of redemption and/or appraisement under the laws of the State of Arkansas.

d. Under the terms of said note and mortgage, defendants, Rogers, agreed to make monthly payments of principal and interest in the amount of $50.00 per month beginning

March 4, 1958. It is provided in such mortgage that if the makers of such note shall fail to pay the indebtedness secured at the time and in the manner provided, the mortgagee or its assigns shall have the right and power to foreclose the lien of said mortgage.

e. Defendants, Rogers, made payments on said note sufficient to reduce the principal due thereon to $1,846.50, but said defendants have failed and neglected to make payments of installments due August 4, 1959, and thereafter, although demand therefor has been made, and said defendants are now in default since at least August 4, 1959. The amount of the unpaid principal balance on said note is $1,846.50, and interest thereon to the date of hearing is $210.20, making a total of $2,056.70 for which cross-complainant, The Development Company, Inc., is entitled to judgment against defendants, Ocie A. Rogers and Florene W. Rogers. Said cross-complainant's right to have foreclosure of said mortgage has become absolute.

119 4.2 During the period from January 23, 1959, to March 19, 1960, cross-complainant, Alfred J. Anderson, performed work for defendants, Rogers, on the real property described above in the total amount of $446.35. To secure such sum, cross-complainant, Anderson, on April 18, 1960, filed a labor lien in the office of the Circuit Clerk of the Fort Smith District of Sebastian County, Arkansas.

b. Since the filing of such lien, defendants, Rogers, have paid thereon a total of $240.00 and as of the date of hearing, the balance due on the account secured by such lien is $206.35, which defendants, Rogers, have failed and neglected to pay, despite repeated demands by cross-complainant, Anderson. Said cross-complainant is entitled to judgment against defendants, Rogers, in such amount of $206.35, and to foreclosure of said cross-complainant's labor lien.

5. Defendant, Art Lundren, in his answer and cross-complaint claims to have furnished labor and material to defendants, Rogers, in the amount of $5,688.18, which were incorporated in improvements of or repairs to the real property described above, over a period from March 28,

1958, to April 3, 1961. Cross-complainant, Lundren, on May 2, 1961, filed with the Circuit Clerk of the Fort Smith District of Sebastian County, Arkansas, a mechanic and materialman's lien purporting to set forth his account, and his answer and cross-complaint prays for judgment and foreclosure of his claimed lien. Cross-complainant,
120 Lundren's, account and claimed lien were denied by defendants, Rogers, and by cross-complainant, Alfred J. Anderson. The Court finds that cross-complainant, Lundren, has failed to prove his account in the amount of $5,688.18 or in any other amount, and further has failed to prove that he furnished labor or materials which were incorporated in the real property described above on dates and in amounts which entitle him to a material or labor lien against such property. The cross-complaint of defendant, Lundren, should therefore be dismissed, but without prejudice to the right of cross-complainant, Lundren, to file a separate proceeding against defendants, Rogers, for the purpose of obtaining an accounting of the transactions between them.

6. The United States of America is entitled to a lien against the real property described above, as a result of Notices of Federal Tax Lien filed with the Circuit Clerk of the Fort Smith District of Sebastian County, Arkansas. The dates of such Notices, amounts thereof, interest to the date of hearing, and lien fees included in the lien of the United States of America are as follows:

Date of Filing	Taxes	Interest to November 9, 1961	Lien Fees	Total
November 29, 1960	$ 559.52	$98.15	$2.00	$ 659.67
January 30, 1961	1567.14	92.89	1.00	1,661.03
April 14, 1961	1288.96	54.73	1.00	1,344.69
July 17, 1961	1606.87	45.36	1.00	1,653.23
October 3, 1961	1148.69	14.35	1.00	1,164.04
TOTAL AMOUNT OF LIEN OF UNITED STATES OF AMERICA				$6,482.66

7. Defendants, Lee Davis and Jeff Davis, partners doing business as J. S. Davis & Sons Lumber Company; First Bancredit Corporation; Galen F. Schlund; and
121 Arkansas School of Cosmetology Inc. have no right, title, interest, lien, equity or estate in the real property described above, if any they have, same is subordinate

to the liens heretofore found to exist in favor of plaintiff and cross-complainants.

8.a. The lien of plaintiff, Pioneer American Insurance Company is a first, prior and paramount lien on the property described as:

Lots 5 and 6 in Block 83 of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

prior and paramount to the right, title, lien, claim or interest of the defendants and each of them.

b. The second lien in order of priority is that of cross-complainant, The Development Company, Inc.

c. The third lien in order of priority is that of Alfred J. Anderson.

d. The fourth lien in order of priority is that of United States of America.

e. The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned, and to the lien of The Development Company, Inc. and Alfred J. Anderson. The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures advances for taxes and insurance premiums and attorney's fee (hereinafter fixed by the Court). The Court finds that under the Arkansas law plaintiff, Pioneer American Insurance Company, is entitled, as against The Development Company, Inc. and Alfred J. Anderson, to a first
122 lien to secure not only principal and interest of the main obligation, but also advancements for taxes and insurance premiums and attorney's fees fixed by the Court. The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, (for all amounts it secures, including principal of the note and interest thereon; advances for payment of taxes and insurance premiums, and interest thereon; and attorney's fees fixed by the Court); and subordinate also to the liens of The Development Company, Inc. and Alfred J. Anderson.

9. On the hearing date, Verdon Bennett, the Receiver heretofore appointed by the Court herein, filed his report which reflects that since he was appointed Receiver on May 9, 1961, he has collected rentals on the real property described above in the total amount of $1,775.00, which sum is now on deposit in the Receiver's account. At the hearing the Court inquired whether there were any exceptions to the Receiver's report, and no exceptions were made known. The Court finds the fair value of the services rendered by the Receiver to be $175.00 and fixes his compensation as Receiver at such amount of $175.00. The Receiver should disburse such compensation to himself individually, and deposit all remaining funds in his hands, together with any amounts collected in the future, in the Registry of the Court, to be applied against costs herein and judgments rendered herein in the same manner as sale proceeds, and as hereinafter indicated.

123 10. The note held by plaintiff, Pioneer American Insurance Company provides for an attorney's fee in event of foreclosure proceedings. The Court finds the reasonable value of the services of plaintiff's attorneys herein to be $1,250.00, and fixes their fee in such amount of $1,250.00, the same to be a part of the total amount secured by plaintiff's first lien.

The Court being well and sufficiently advised in the premises, it is, therefore

CONSIDERED, ADJUDGED AND DECREED that Pioneer American Insurance Company do have and recover of and from defendants, Ocie A. Rogers, Florene W. Rogers, The Development Company, Inc., and James F. Taylor, personally, and against Cecil Laughlin, in rem, jointly and severally, the sum of $18,689.87, with interest thereon at the rate of six per cent (6%) per annum from the date of hearing (November 9, 1961) until paid; that plaintiff, Pioneer American Insurance Company, has a valid first lien upon the lands and property in Sebastian County, Arkansas, described as:

Lots 5 and 6 in Block 83 of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

to secure the payment of this judgment, which lien is superior and paramount to any right, title, claim, interest, equity or estate of the defendants, or anyone claiming by, through or under them; it is further

CONSIDERED, ADJUDGED AND DECREED that defendant and cross-complainant, The Development Company, Inc., have and recover of and from defendants, Ocie A. Rogers and Florene W. Rogers, jointly and severally, the sum of
124 $2,056.70, with interest thereon at the rate of six per cent (6%) per annum from the date of hearing until paid; that cross-complainant, The Development Company, Inc., has a valid and subsisting second lien upon the property described above to secure payment of this judgment, which lien is subordinate and inferior only to the first lien of plaintiff, Pioneer American Insurance Company, and is prior and superior to the lien of each and every of the other defendants; it is further

CONSIDERED, ADJUDGED AND DECREED that defendant and cross-complainant, Alfred J. Anderson, have and recover of and from defendants Ocie A. Rogers and Florene W. Rogers, jointly and severally, the sum of $206.35, with interest from the date of hearing until paid at the rate of six per cent (6%) per annum; that cross-complainant, Anderson, has a valid and subsisting third lien upon the property described above to secure payment of this judgment, which lien is subordinate and inferior only to the first and second liens herein, and is prior and superior to the lien of each and every of the other defendants; it is further

CONSIDERED, ADJUDGED AND DECREED that cross-complainant, United States of America, by virtue of its notices of Federal Tax Lien heretofore filed, have and recover of and from defendants, Ocie A. Rogers and Florene W. Rogers, the sum of $6,482.66, with interest on taxes and lien fees ($6,177.18) from the date of hearing until paid at the rate of six per cent (6%) per annum; that cross-complainant, United States of America, has a valid and subsisting fourth lien upon the property described above to secure payment of such amount, which lien is
125 subordinate and inferior only to the first, second and third liens herein, and is prior and superior to the

lien or other claim of each and every of the other defendants; it is further

CONSIDERED, ADJUDGED AND DECREED that the cross-complaint of Art Lundren be and it is hereby dismissed for want of equity; it is further

CONSIDERED, ADJUDGED AND DECREED that Verdon Bennett, the Receiver heretofore appointed by the Court, be and he hereby is allowed a fee for his services as Receiver in the amount of $175.00; that he shall disburse the same to himself individually, and deposit all other sums on hand, together with any future collections, in the Registry of the Court, which sums shall be applied to the costs herein and to payment of judgments and liens in the order and as hereinafter indicated; it is further

CONSIDERED, ADJUDGED AND DECREED that the attorneys for plaintiff, Pioneer American Insurance Company, be and they hereby are awarded a fee in the amount of $1,250.00 for their services herein, which amount is a part of the judgment heretofore rendered in favor of said plaintiff; it is further

CONSIDERED, ADJUDGED AND DECREED that if the sums adjudged to be due, as well as interest thereon, be not paid within ten days from the date this decree is signed, together with the costs of this action (which are hereby adjudged against the defendants, Ocie A. Rogers, Florene W. Rogers, The Development Company, Inc., James F. Taylor, and Cecil Laughlin, jointly and severally), that the Commissioner of this Court, hereinafter named, shall,

126 after advertising the time, terms and place of sale for a period of 20 days by publication of a notice thereof in some newspaper published in Sebastian County, Arkansas, and having a bona fide circulation therein, by three insertions, once each week; the last of which shall be not less than five days before the date of sale, sell at the front door of the Sebastian County Courthouse in Fort Smith, Arkansas, at public outcry to the highest bidder, on a credit of three months, the lands and property hereinabove described. The purchaser at such sale shall be required to give bond with surety thereon to be approved by the Commissioner making the sale, and

a lien on said property shall be retained to secure payment of the bond given for the purchase money bid at such sale; provided, that if plaintiff, Pioneer American Insurance Company shall become the purchaser at such sale for a sum equal to or less than the amount adjudged to be due it herein, in lieu of giving bond as required herein, it may credit the amount of its bid, less the costs of this action, and the fee to be allowed the Commissioner for executing this decree, upon the decree at the time of confirmation of such sale, which credit shall be an extinguishment of this judgment to the extent of such credit; and provided further that if its bid shall exceed the amount of its judgment and costs, it shall be required to give bond only for the excess; that if a subordinate lienor shall become the purchaser at such sale, said subordinate lienor shall be required to execute bond for no more than the amount of the judgment and interest in favor of lienors prior to him, and the costs of this action, and for such additional amount as the bid of such subordinate lienor may exceed the amount
127 of his judgment; it is further

CONSIDERED, ADJUDGED AND DECREED that the proceeds of sale and all funds in the registry of the Court applicable to this proceeding, including funds there deposited by the Receiver, be applied in the following order:

1. To pay costs herein, including the fee to be allowed the Commissioner for executing this decree.

2. The judgment in favor of plaintiff, Pioneer American Insurance Company, and interest thereon.

3. The judgment in favor of cross-complainant, The Development Company, Inc., and interest thereon.

4. The judgment in favor of Alfred J. Anderson, and interest thereon.

5. The amount due the United States of America by virtue of the filing of its Notices of Federal Tax due, with interest thereon.

6. Surplus, if any, shall be paid to defendants, Ocie A. Rogers and Florene W. Rogers.

It is further

CONSIDERED, ADJUDGED AND DECREED that upon a sale of said lands and property as aforesaid, and confirmation thereof by this Court, all of the right, title, claim, interest, estate, equity or right of redemption of the defendants, or any of them, in and to said property, and every part thereof, shall be, and the same is hereby decreed to be forever barred and foreclosed, including all right or possibility of dower and/or homestead of Florene W. Rogers.

128 After confirmation of said sale, and after execution and delivery of the Commissioner's Deed, this Court's writ of assistance shall issue to the Sheriff of Sebastian County, Arkansas, directing him to place said property in the custody of the purchaser at such sale; it is further

CONSIDERED, ORDERED, ADJUDGED AND DECREED that Otis O. Harris, Jr., be, and he hereby is appointed Commissioner of this Court to execute this decree, and to make the sale aforesaid and report his actions hereunder to this Court.

To the findings and orders of the Court Cross-complainants, Art Lundren and United States of America except and ask that their exceptions be noted of record, which is hereby done.

The Court doth retain control of this cause for such further orders and judgments as may be necessary to enforce and protect the rights of the parties hereto as herein adjudged, and the rights of such persons as may hereafter become parties to this action by proper proceedings.

/s/ HUGH M. BLAND
Chancellor
Date signed: November 15th, 1961.

As to defendant James F. Taylor only, the lien of the within judgment in favor of plaintiff Pioneer American Insurance Company is hereby released only as to Lot 90 (Ninety)

Eastern Hills Addition to the City of Fort Smith, Sebastian County, Arkansas, this 29th day of November, 1961.

BETHELL & PEARCE
By /s/ OWEN C. PEARCE
Attorneys for Plaintiff Pioneer American Insurance Company

Attest:
OTIS O. HARRIS, JR.
By DOROTHY NIGH, D.C.

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129 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

(Title omitted)

Notice of Appeal by United States—Filed December 11, 1961

Notice is hereby given that United States of America, defendant and cross-complainant above named, hereby appeals to the Supreme Court of the State of Arkansas from the Judgment entered November 10, 1961.

CHARLES W. ATKINSON
United States Attorney

By /s/ ROBERT E. JOHNSON
Robert E. Johnson
Assistant U. S. Attorney

CERTIFICATE OF SERVICE
(Omitted in printing)

130 (File endorsement omitted)

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135 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT
TO THE SEPTEMBER TERM THEREOF, 1961

(Title omitted)

Report of Sale—Filed December 21, 1961

TO THE HON. HUGH M. BLAND, Chancellor:

The subscriber respectfully reports, that in pursuance of the authority and directions contained in the decretal

order of his Honorable Court, made and rendered in the above entitled cause on the 15th day of November, 1961, he gave notice of the time, place and terms for the sale of the land and premises therein described, to-wit:

> Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

by publication in the manner and for the time prescribed by law and said decree, and on the day fixed for the sale, viz; the 21st day of December, 1961, he did offer said land and premises for sale to the highest bidder, on a credit of three months, at the west door of the County Court House in the City of Fort Smith, the place designated by said decree for the sale thereof, and named in the notice (a copy of which is hereto annexed), and at such sale
136 so made and had by him Graham W. and Helen Idell Jones bid and offered the sum of Twenty-three Thousand Six Hundred and no/100 Dollars for said land and premises, and that being the highest bid, the same was struck of and sold to them for that sum: Twenty-three Thousand Six Hundred and no/100 ($23,600.00).

And the said subscriber respectfully asks that he be allowed the sum of $35.00 for his services as Commissioner herein.

All of which is respectfully submitted.

/s/ Otis O. Harris, Jr.
(SEAL) *Commissioner in Chancery*

(File endoresment omitted)

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139 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

(Title omitted)

Confirmation and Approval of Report of Sale—January 16, 1962

On this 16th day of Jan., 1962, comes on for examination and approval the Report of Sale of Otis O. Harris, Jr., the commissioner heretofore appointed by the Court to execute

the decree rendered in this case, and said report being in words and figures as follows, to-wit:

"To the Honorable Hugh M. Bland, Chancellor:

"The subscriber respectfully reports that in pursuance of the authority and directions contained in the decretal order of this honorable court made and rendered in the above entitled cause on the 15th day of November, 1961, that he gave the notice of the time, place and terms for the sale of the land and premises therein mentioned, described as follows, to-wit:

> Lots Five (5) and Six (6) in Block Eighty-three (83) of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas,

by publishing in the manner and for the time prescribed by law in said decree.

And, on the day fixed for the sale, viz, 21st day of Dec., 1961, he did offer said land and premises for sale to
140 the highest bidder on a credit of three months at the west door of the Court House in the City of Fort Smith, Arkansas, the place designated by said decree for the sale thereof, and named in the notice (a copy of which is hereto annexed) and at such sale so made and had by him Graham W. Jones and Helen Idell Jones bid and offered the sum of $23,600.00 for said premises, and that being the highest bid, the same was struck off and sold to the said Graham W. Jones & Helen Idell Jones for the sum of $23,600.00. And the said subscriber respectfully asks that he be allowed the sum of $35.00 for his services as commissioner herein, all of which is respectfully submitted."

And it appearing to the Court that the Report of Sale was filed herein more than three days prior to this date and that no exceptions have been filed, nor objections urged thereto, and the Court being well and sufficiently advised in the premises does in all things approve said report and confirm said sale made aforesaid and the said commissioner is directed, upon the payment of the amount of said bid, he having elected to pay cash and waived credit, to execute the above named purchaser a good and sufficient deed to

the above described property and present the same to the court for approval.

/s/ HUGH M. BLAND
Chancellor

(Entered of record in Chancery Court Record 27 at page 276)

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149 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS

Fort Smith District

(Title omitted)

Motion for Distribution of Funds—Filed January 17, 1962

Comes the plaintiff, Pioneer American Insurance Company, and for its Motion for Distribution of Funds now in the hands of the Commissioner, shows the court as follows:

1. Foreclosure sale of Lots Five and Six in Block Eighty-three of Fitzgerald Addition to the City of Fort Smith, Sebastian County, Arkansas, has been completed, and, on January 3, 1962, Graham W. Jones and Helen Idell Jones, purchasers of said property at said foreclosure sale, paid over to the Commissioner the sum of Twenty-three Thousand Five Hundred Sixteen and 67/100 Dollars ($23,561.67). A receivership fund in the amount of $1,850.00 is also now in the hands of the Commissioner, said fund representing rental payments made on said property during pendency of this action.

2. Distribution of all sums now in the hands of the Commissioner should be made as follows:

$257.55 for court costs, including a $35.00 Commissioner's fee;

$18,764.63 to Pioneer American Insurance Com-
150 pany, a corporation, which includes $74.76 interest accrued since date of decree herein;

$1,250.00 to Bethell & Pearce, representing attorney's fees allowed to Pioneer American Insurance Company;

$2,064.93 to The Development Company, Inc., a corporation, which includes $8.23 interest accrued since date of decree herein;

$207.18 to Alfred J. Anderson d/b/a Anderson Plumbing & Heating Company, which includes eighty-three cents interest accrued since date of decree herein;

And remainder to United States of America.

WHEREFORE, movant prays that distribution of funds now in the hands of the Commissioner be made to all parties herein as set forth above.

PIONEER AMERICAN INSURANCE COMPANY and GEORGE F. CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE COMPANY, *Plaintiffs*

By: BETHELL & PEARCE
Attorneys for Plaintiffs

By /s/ DONALD P. CALLAWAY

Certificate of Mailing—Omitted in Printing

151 (File endorsement omitted)

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152 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS

Fort Smith District

(Title omitted)

Response to Motion for Distribution of Funds—Filed January 18, 1962

Comes now the defendant, United States of America, by and through its attorney for the Western District of Arkansas, and shows and makes known to the Court:

1. The defendant has filed Notice of Appeal and further filed Designation of Record herein for appeal of the decision of this case concerning priority to the Supreme Court of the State of Arkansas.

2. The defendant, United States, has no objection to distribution of a part of the assets now in the hands of the Commissioner as long as the sum of $2,750.00 is retained by him subject to final order after appeal is finally decided.

WHEREFORE, defendants, United States, prays that the sum of $2,750.00 be retained in the registry of the Court and such other relief to which it might be entitled.

CHARLES M. CONWAY
United States Attorney

By /s/ ROBERT E. JOHNSON
Robert E. Johnson
Assistant U. S. Attorney

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153 Certificate of Service omitted in printing

(File endorsement omitted)

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154 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS

Fort Smith District

(Title omitted)

Order—January 22, 1962

On the 22nd day of January, 1962, plaintiffs' motion for distribution of funds came on for hearing. Appearances at the hearing were as follows: Plaintiff, Pioneer American Insurance Company, and defendant, The Development Company, Inc., by their attorneys, Bethell & Pearce and Donald P. Callaway; defendant, Alfred J. Anderson, by his attorney, Franklin Wilder, Robert E. Johnson, Assistant U. S. Attorney, had previously advised the Court that he could not attend the hearing because of a conflict in court calendars, and had requested the Court not to make a ruling on whether the United States of America would be required to file a supersedeas bond, until he had opportunity to be heard on this point. He had further advised the Court to

the same effect as stated in the response of the United States of America, that the United States has no objection to distribution of a part of the assets now in the hands of the Commissioner, so long as the sum of $2,750.00 is retained by the Commissioner pending disposition of
155 the appeal herein, or decision by this Court as to whether the United States will be required to file a supersedeas bond.

Although notice of such hearing was given for the time and in the form and manner required by law, no parties appeared, either in person or by attorneys, except as recited above.

It being the day regularly set for hearing plaintiffs' motion for distribution of funds, the same was heard upon such motion, the responses thereto by the United States of America, the contents of the file herein, and statements of counsel, from all of which the Court finds as follows:

1. If distribution is made presently to the first, second and third lienors (Pioneer American Insurance Company, The Development Company, Inc., and Alfred J. Anderson respectively), including attorneys' fees allowed by the Court, there will remain in the hands of the Commissioner a sum greater than the sum of $2,750.00 which defendant United States of America has requested to be retained in the Registry of the Court.

2. There is therefore no reason why distribution should not be made to the first, second and third lienors.

It Is Therefore Ordered that Otis O. Harris, Jr., the Commissioner heretofore appointed by the Court, be and he is authorized and directed to distribute funds in
156 his hands to the first, second and third lienors (Pioneer American Insurance Company, The Development Company, Inc. and Alfred J. Anderson respectively), including Court costs and attorneys' fees heretofore fixed and awarded by the Court; that no less than $2,750.00 be retained in the Registry of the Court; and that the question of whether defendant United States of America will be required to file a supersedeas bond herein to stay distribution of the funds remaining in the hands of the Commis-

sioner will be continued until defendant United States of America may be heard on such question.

Entered now for them.

Date: 1-22-62.

/s/ HUGH M. BLAND
Chancellor

(Entered of record in Chancery Court Record 27 at page 312)

(File endorsement omitted)

160 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DIVISION

No. 570

PIONEER AMERICAN INSURANCE COMPANY AND GEORGE F. CARPENTER, TRUSTEE FOR PIONEER AMERICAN INSURANCE COMPANY, *Plaintiffs*

v.

THE DEVELOPMENT COMPANY, INC., a corporation; CECIL LAUGHLIN; JAMES F. TAYLOR; OCIE A. ROGERS AND FLORENE W. ROGERS; LEE DAVIS AND JEFF DAVIS d/b/a J. S. DAVIS & SONS LUMBER COMPANY; FIRST BANCREDIT CORPORATION, ST. PAUL, MINNESOTA; ALFRED J. ANDERSON d/b/a ANDERSON PLUMBING & HEATING COMPANY; AND UNITED STATES OF AMERICA, *Defendants*

Bill of Exceptions—Filed March 1, 1962

EVIDENCE ADDUCED BEFORE HON. HUGH M. BLAND CHANCELLOR TENTH CHANCERY CIRCUIT OF ARKANSAS

November 9, 1961

APPEARANCES:

For Plaintiffs:

BETHELL & PEARCE
Attorneys at Law
Professional Building
Fort Smith, Arkansas

For Defendant, The Development Company, Inc:

BETHELL & PEARCE
Attorneys at Law
Professional Building
Fort Smith, Arkansas

For the Defendants Ocie A. Rogers & Florene W. Rogers:

MR. CHARLES R. GARNER
Attorney at Law
1322 North B Street
Fort Smith, Arkansas

161 For the Defendant Alfred J. Anderson d/b/a Anderson Plumbing & Heating Company:

MR. FRANLIN WILDER
Attorney at Law
Professonal Building
Fort Smith, Arkansas

For the Defendant United States of America:

MR. ROBERT E. JOHNSON
Assistant U. S. Attorney
Federal Building
Fort Smith, Arkansas

For the Defendant Art Lundren:

MR. FINES F. BATCHELOR, JR.
Attorney at Law
Van Buren, Arkansas

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162 **Colloquy Between Court and Counsel**

Mr. Johnson: If the Court please, I would like to file an amended answer.

Mr. Pearce: We object to this. If the Government is permitted to file successive liens we never will get through with this lawsuit. Certainly as far as the plaintiff and

cross-complainant, Development Company, is concerned we certainly would want to question whether these liens are prior to anyone in this lawsuit.

The Court: I will let them be filed and determine that when we get to it as to whether or not they are valid liens. We have had a pre-trial conference on this and a pre-trial order was made in the case on the 7th of September, 1961. I suppose all of you have copies of that pre-trial order. Would you like to make short statements of the issues?

Mr. Pearce: Bethell & Pearce and Donald Calloway are appearing for plaintiff, Pioneer American Insurance Company and Cross-Complainant, The Development Company, Inc. Mr. Charles R. Garner for Ocie Rogers and Florene Rogers; Mr. Robert L. Johnson, representing the
163 United States of America; Mr. Franklin Wilder, representing Alfred J. Anderson Plumbing Company; Mr. Fines F. Batchelor, representing Mr. Art Lundren--

The Court: That will be one of the claims that will be controverted?

Mr. Batchelor: Yes, sir.

The Court: The Receiver has filed his report showing that he collected rentals in the amount of $1775.00 as of November 8, 1961, representing monthly rent for the month of November, 1961. Is there any question about that Receiver's report?

(No answer).

The Court: All right. Now all of those that know themselves to be parties and witnesses in this case, will they please come to the bar and hold up your right hand and be sworn.

(Witnesses are sworn by the Clerk).

The Court: Does anyone request the rule? The rule is not requested, so you all may remain in the courtroom.

Now, let me ask you, how do you want to proceed in
164 this matter? I believe everyone admits the execution of the note and mortgage, and that it is a first lien on the property, is that right?

Mr. Garner: Yes, sir.

Mr. Pearce: Yes, sir.

The Court: So at this time the Court without objection from all of the parties, will enter judgment for the plaintiff against all defendants foreclosing the mortgage and personal judgment in the amount of—

Mr. Pearce: We are going to have a witness to bring that up to date.

The Court: Maybe we had better wait then. Just wait then.

Mr. Garner: Isn't that a question of mathematics? If it is I would have no—6% of $1000 is $60.00 I understand.

Mr. Pearce: That will be fine. I think we can save some time probably. We would like to designate copies of the main documents—we have the originals here in the record at this time—as Plaintiff's Exhibit 1, if the
165 Court please, the note by the Development Company and others to Republic Mortgage Company, Inc. dated May 24, 1956, which has been negotiated by Republic Mortgage Company, Inc. to Pioneer American Insurance Company, and what we would like to do is introduce a copy which appears as Exhibit A to the complaint in the record.

Mr. Garner: Mr. Ocie Rogers, the defendant, has no objection.

The Court: Any objection to that at all? In other words, you want to introduce the original and substitute a photostatic copy attached to the complaint as Exhibit A?

Mr. Pearce: That is correct.

The Court: It will be admitted.

(Plaintiff's Exhibit #1 introduced in evidence)

* * * * * * * * * * *

168 Mr. Pearce: As Plaintiff's Exhibit B—Exhibit 2, rather—we desire to introduce the original and substitute the copy which is attached to the complaint as Exhibit B, of the Deed of Trust, made by the Development Company, Inc. to Republic Mortgage Company, Inc. dated May 24, 1956, and which appears of record in Mortgage Book 186 at page 490.

The Court: And substitute for that Exhibit B attached to the Complaint?

Mr. Pearce: Correct, Your Honor.

The Court: All right, that will be admitted.

Mr. Garner: Defendant Ocie Rogers has no objection.
Mr. Wilder: No objections.

(Plaintiff's Exhibit #2 introduced in evidence)

* * * * * * * * * * *

174 Mr. Pearce: As plaintiff's Exhibit #3 we desire to introduce the original and substitute the copy which is attached as Exhibit C to the complaint of the assignment by Republic Mortgage Company, Inc. to Pioneer American Insurance Company, and this assignment is dated the 27th of July, 1956, and appears of record in Book 190 at page 10.

The Court: It will be admitted without objection.

(Plaintiff's Exhibit #3 introduced in evidence)

* * * * * * * * * * *

177 Mr. Pearce: If I could go just a little bit out of order at this time, Your Honor, I would like to introduce the exhibits of the Cross-Complainant, The Development Company, which is the second mortgage.

The Court: All right.

Mr. Pearce: As Exhibit #1 of the Cross-Complainant, Development Company, Inc., we would like to offer the original note and substitute Exhibit A to the cross-complaint, which is a copy of this note. This note bears the date of March 4, 1958, in the amount of $2500.00 and is made by Ocie O. A. Rogers and Florene W. Rogers in favor of the Development Company, inc.

The Court: Any objections? It will be admitted.

(Cross-Complainant's Exhibit #1 introduced in evidence)

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179 Mr. Pearce: As Exhibit 2 of the Cross-Complainant The Development Company, Inc., we desire to offer the original mortgage and substitute for the original the copy thereof for which is attached as Exhibit B to the Cross-Complaint of The Development Company, Inc. This mortgage is made by Ocie A. Rogers and Florene W. Rogers in favor of the Development Company, Inc., dated the 4th day of March, 1958, and it appears of record in Book 158 at page 164.

The Court: Any objection?
Mr. Garner: No, sir.
The Court: It will be admitted.

(Cross-Complainant's Exhibit #2 introduced in evidence)

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185 Mr. Pearce: As Exhibit C of the Cross-Complainant, The Development Company, Inc., we should like to introduce the recorded deed from the Development Company, Inc. to Ocie A. Rogers and Florene W. Rogers, which appears in Book 158 at page 255, dated March 4, 1958. Now, Mr. Harris is here. I had intended for him to read only the description and the assumptive clause by the Rogerses. If all parties are agreeable, we could waive the reading of those and let the deed be included in the record by reference to the book and page number.
The Court: Any objections?
Mr. Garner: No, sir.
The Court: All right, it will be admitted.

(Cross-Complainant's Exhibit #3 introduced in evidence)

CHARLES KECK

• • • • • • • • • •

188 Mr. Pearce: Then I should like to call in behalf of the plaintiff, Mr. Charles Keck. Mr. Keck, will you just give us the amount of the principal, the interest up to the present day, and the advances for taxes and insurance on the part of the Republic Mortgage?
Mr. Keck: The unpaid principal balance, $15,926.98. Escrow advances for the payment of taxes and insurance, $430.66.
Mr. Pearce: That is the net amount, is it?
Mr. Keck: That is the net amount of the advances.
Mr. Pearce: $430.66?
Mr. Keck: That is right. Interest on the unpaid principal balance from October 1, 1960, to November 9, 1961, $1,059.15, and interest on the advances at the same rate, $23.08, total interest of $1,082.23, to date.
Mr. Pearce: Do you have a total of the entire amount?
Mr. Keck: No, sir, but I can calculate it real quick.

Mr. Garner: Is that interest at the rate calculated allowed by the mortgage and the notes?

189 Mr. Keck: Yes, sir. I calculate the total to be $17,009.21.

Mr. Pearce: I wonder if anyone else added these up. I didn't get that. Did you include the advances in there?

Mr. Keck: No, sir, that does not include the advances. That makes a total of $17,439.87.

The Court: That is what I got.

Mr. Pearce: If those amounts can be stipulated to it will save some time.

The Court: Can you stipulate as to those amounts?

Mr. Johnson: I would like to note the dates of those advances—give the dates and amounts of the advances and the credits against the advances.

Mr. Keck: On February 13, 1961, Pioneer American advanced $376.08; on March 9, 1961 they advanced $236.82. Those advances were made to permit us to pay an insurance premium and 1960 state and county taxes. A rebate or returned insurance premium was received so that on July 3, we were able to return to Pioneer American Insurance Company $229.36. That made the net total

190 advance $430.66, and interest was calculated, as I told you awhile ago on the actual periods that the—in other words, $376.80 for 24 days on $660.02 for 114 days, and $430.66 for 126 days.

Mr. Johnson: That answers the question.

Mr. Pearce: Is that all stipulated to?

Mr. Garner: Yes, sir.

Mr. Johnson: Yes, sir.

Mr. Wilder: Yes, sir.

Mr. Batchelor: Yes, sir.

Mr. Pearce: I will ask Mr. Harrison, if he will, on the part of The Devolpment Company, Inc. the amount of accrued interest. What is the amount your records show?

Mr. Harrison: The principal amount due $1846.50 There is interest due computed at the rate of 5% for a perior from August 1, 1959, through November 9, 1961—2 years 101 days—totaling $210.20.

Mr. Pearce: The total of those?

Mr. Harrison: $2,056.07.

Mr. Pearce: If that can be stipulated to it will save some time.

The Court: Is that stipulated, gentlemen?

191 Mr. Garner: Yes, sir.

Mr. Johnson: Yes, sir.

Mr. Wilder: Yes, sir.

Mr. Batchelor: Yes, sir.

Mr. Pearce: If the Court please, there are three other matters so far as the plaintiff and cross-complainant, Development Company, are concerned that perhaps should be taken up at another time. That is the matter of the attorney's fee, and a fee for the Receiver, and the point about the claimed priority of the Government lien. Those things we would like to reserve to go into at the proper time, whenever the Court would like to hear them.

The Court: All right.

Mr. Pearce: Therefore, the plaintiff rests, and also the cross-complainant Development Company, Inc.

The Court: All right. Is there any dispute at all about the claim of Alfred J. Anderson. In the pre-trial conference that was agreed upon.

192 Mr. Garner: That is true.

The Court: Mr. Wilder, will you give us the amount of the claim of the Alfred J. Anderson Plumbing Company?

Mr. Wilder: Yes, sir, Your Honor, there is a balance due on the lien of $206.35. We would like to offer Defendant's Exhibit #1 and #2, which is the Notice and copy of the lien, please sir.

Mr. Garner: No objections.

The Court: It will be admitted.

(Defendant's Exhibit #1 and #2 introduced in evidence)

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203 The Court: Now, that brings us down to the claim of Art Lundren.

Mr. Garner: We will admit, Your Honor, that they filed it. We will not admit that it is a proper or legal lien in any manner, and will not admit the dates. I will admit that the Clerk will testify that they did file a lien, an alleged lien.

The Court: All right.

Mr. Batchelor: And let it be introduced in evidence?

Mr. Garner: Yes, sir.

The Court: All right. Do you have the lien there?

Mr. Batchelor: The Clerk has and we would like withdraw the original lien and substitute the copy that is attached.

The Court: That will be marked Lundren's Exhibit #1. The Materialman's and Mechanics Lien is offered in evidence and permission granted to substitute a photostatic copy.

Mr. Batchelor: May we substitute the copy that is attached to the Answer?

The Court: Yes, and permitted to substitute copy of lien attached to the Answer.

204 Mr. Batchelor: We style it Separate Answer of Art Lundren and prayer for lien foreclosing judgment.

The Court: And permission is granted to substitute list of materials and labor attached to that Answer as Exhibit A.

The Court: All right.

(Lundren's Exhibit #1 introduced in evidence)

* * * * * * * * * * *

234 MR. JOHN REYNOLDS, being called to the witness stand on the part of the United States of America, after being duly sworn, testifies as follows:

Direct Examination

By Mr. Johnson:

Mr. Garner: Since we don't dispute that lien may we just be dismissed.

The Court: No, you just stick around awhile. I don't think anybody disputes this lien.

Mr. Johnson: All I am wanting to do is to bring to the Court's attention the amount due as of now on each lien, because I feel that the priority in each lien is different probably.

The Court: All right.

Q. Mr. Reynolds, you are with the Internal Revenue Service? A. Right.

Q. Do you have a computation of the amount due as of

today on each of the liens filed against Ocie and Florene Rogers? A. Yes, sir, I do.

Q. Now, the lien filed on November 29th, 1960, what is the total amount due as of this date on that lien? A. You would like to have the tax lien free and interest to date?

Q. The total to date.

235 Mr. Pearce: We would like to have it broken down.

A. The tax is $559.52, interest $98.15, lien fee $2.00, a total of $659.67.

Q. Now as to the lien filed January 30th, 1961? A. Tax on that is $1,567.14, interest $92.89, lien fee of $1.00, a total of $1,661.03.

Q. Now, the lien filed April 14th, 1961? A. That amount. the tax is $1,288.96, interest of $54.73, lien fee of $1.00, total $1,344.69.

Q. Now then the lien filed July 17th, 1961? A. That tax is $1,606.87, interest $45.36, lien fee of $1.00, total of $1,653.23.

Q. Now the lien filed October 3, 1961? A. Tax of $1,048.69, interest $14.35, lien fee of $1.00, a total of $1,164.04. That gives a total liability all tax, lien fees and interest of $6,482.66.

Q. I believe it is stipulated that the liens have been filed as of the dates mentioned?

The Court: Yes, that was in the pre-trial. Any cross examination?

Mr. Pearce: Interest computed to when? A. To date.

Cross Examination

By Mr. Garner:

Q. Have you made some collections on this, Mr. Reynolds? A. I am not in a position to say. I do not know.

236 Q. You are not in a position to say whether or not that represents a true and correct amount owed to the United States by this defendant, are you? A. I am prepared to say that is what is owed to date. Whether there have been any payments made on the tax since the assessment, I cannot say, but that is the balance of tax, interest and lien fees as of today.

Q. Do you show any payments lately? A. I beg your pardon, there have been some payments. I have that

listed. I am sorry. I was not aware of that. I can give you those payments and the dates.

Q. In other words, there is not $6,482.66 owing then? A. There is that much owing today.

Q. That is after the credits have been allowed? A. After the credits have been allowed.

Q. When were they allowed, please, sir. A. On your liability for the second quarter of 1960 there was a payment made November 8, 1960, of $63.00; December 12, 1960, $69.28; on March 3, 1961, a payment of $98.75. There was a credit, an overpayment, I believe, from 1960 income tax, which was credited to this account June 16, 1961, of $1,049.10. There is a balance on that tax as was quoted in my original statement of $559.51, 52 cents.

Q. To get down to specifics. Haven't you all garnisheed his wages at the railroad? A. I am not in a position to say. I do not know.

237 Q. You don't know whether there has been any payments made the last month on that account, do you? A. If there have been any payments made they have not been credited to the account.

Q. Within the last month? A. So far as I know, there has not been a payment.

Q. Did you know the Government has garnisheed his wages at the railroad or whatever they do? I don't know what procedure the Government goes through, but they have tied up his wages. A. I am not aware of that, no, sir. That is entirely possible; very probably.

The Court: Let me get it clear then. All of these credits, Mr. Reynolds, you have mentioned, there is still a balance due of $6,482.66? A. Correct, yes, sir.

The Court: If there is no other questions the witness is excused. Now what else is there?

(Witness excused)

238 **Colloquy Between Court and Counsel**

Mr. Pearce: I have one matter. At this time, if the Court please, I would like for the Government to state its position with regard to their claim of priority. Now, I believe all parties are agreed at this time that on the basis of the evidence introduced up to this point, I believe all parties agree to the conception of it that under the

Arkansas law Pioneer American Insurance Company would be entitled to a first lien for the entire amount which was given here, which includes advances and interest, a total of $17,439.87. That the second lien would be in favor of the Development Company for its total amount; and after that lien would come the lien of Anderson Plumbing Company. Now, I think the Government ought to state whether it intends to participate at all until all of those amounts are paid, including Anderson Plumbing Company. I am
interested specifically whether the Government
239 claims that after the principal and interest on the
first lien has been paid, which would amount to about $17,000, if they are claiming that at that point they are entitled to come next and before the Development Company and Anderson Plumbing Company, or if they concede that Pioneer American can collect not only the principal and interest but also the advances, after which comes the Development Company, Anderson Plumbing Company, and then the Government.

The Court: Here is the way I have it down here. Pioneer American Insurance Company should have the first lien based on its recording date of June 7, 1956. The Development Company should have the second priority based on its recording of March 18, 1958. Anderson should have the third priority based on his recording April 18, 1960.

Mr. Wilder: Just one thing. I want to suggest to the Court. As I understand it, our lien would date from the
date of the first material put on the job which,
240 according to the exhibit introduced here this morning, was January 27, 1959.

The Court: It is still second in priority. Now then the United States Government, what is your position. I have that they come next.

Mr. Johnson: Our position is that it is behind all recorded liens. However, as to the date of filing of the lien, it is ahead of any future advances including advances for attorney's fees as of the date of the filing of the complaint.

Mr. Pearce: I think this is where the Government should declare itself. Our position on this is this. We have got about $400 in advances, and we assume the Court is going to allow us an attorney's fee. I think the Government ought to state whether it is claiming to come before those

advances which was put in front of the Development Company and Anderson in this particular case. This is not a case where we have got one lienor. I don't know
241 how the Government can get in front of the advances and the attorney's fees and behind the Devolpment Company and Anderson. I don't think there is any way for them to do that.. I think the Government ought to state definitely what position it takes on that because we have a very serious issue. If they are claiming to come in after a bid of say $17,000.

Mr. Johnson: Our position is, if there is a sale of the foreclosure and it sells for less than the amount of principal and interest of the mortgage, the principal—

The Court: Two mortgages.

Mr. Johnson: Of the second mortgage and the plumbing bill, the Government has no interest whatsoever in the property. However, if it exceeds that, the Government has a first lien if it exceeds the principal and interest of the mortgages and the plumbing bill, then the Government comes in.

Mr. Pearce: Part of the first mortgage is going to be the attorney's fee and the advances. I don't think
242 still the position has been taken on this, and I think the Government ought to be required to state its position on it.

The Court: Now suppose I allow an attorney's fee in this case, which I am going to, and the expense of the Receiver. Isn't that a part of the first mortgage?

Mr. Pearce: That is our position, and especially so in a case like this where there is a second and third lien where those things come before the second and third liens. Now that is the point the Government should say if it is behind all of these things, including our attorney's fee and including advances and Receiver's fee, which I appreciate the Court's mentioning.

The Court: It occurs to me now that the incidental expenses of the foreclosure are included in the lien established by the foreclosure of the mortgage, and therefore the Government would come in after, as you say, they would come in after that but not be entitled to be ahead of any advances, or attorney's fees or Receiver's.

243 Mr. Johnson: It is our position that the liens are by federal law rather than by state law, and the

federal laws controls that in any advances made after the date of notice of our lien—

The Court: I wonder how binding that is on this court?

Mr. Johnson: I feel as though, it being federal law, it is binding on all courts.

Mr. Pearce: I think Mr. Johnson is stating his position. He wants us to take principal and interest, then the next thing he wants is his lien. In effect, he wants to get in front of the second and third lienors.

Mr. Johnson: No, you are putting words in my mouth.

Mr. Pearce: How could you get behind the second and third lienors—

The Court: He is not trying to get that, Mr. Pearce, as I understand it. He is saying that if the property brings enough to pay the principal and interest, attorney fees, advances and so on and so forth of the first and
244 second mortgage and the plumbing bill, then the Government should come in, is that right?

Mr. Johnson: No, what I am saying is that the principal and interest and receiver's fee also is an expense incidental to the Court, but we come ahead if it brings more than principal and interest of both mortgages and the plumbing bill, then we are entitled to priority no matter who gets hurt.

The Court: You mean over and above the attorney's fee?

Mr. Pearce: But we are entitled to priority over the second and third lien as to our advances and attorney's fees. Therefore, he is trying to get the second lien, that is in effect what he is saying. I want to ask the Court for a ruling that Pioneer American Insurance Company has a lien not only for its principal and interest but also for the advances and for the attorney's fees, and I think the Receiver's fee would be an expense of the court which would come in before.

245 The Court: I have read those federal cases, now, in the Fourth Circuit. The Eighth Circuit has never passed on it. I read those cases. Now, they are based upon a federal statute. Now here we have got a basic state law that establishes these liens. How the federal government can come in here and say that they can do that.

I may get reversed, but I am not going to go along with that. I may be wrong. I am just not going to go along with that. So I don't think it is right. I am going to rule that the Pioneer, or the plaintiff in this case, and the Development Company has prior liens, principal, interest, attorney's fees, advances, and Receiver's fees, over and above the Government, and the Government's lien will not intercede, in any way, to be superior or ahead of those liens.

Mr. Johnson: Save our exceptions.

Mr. Pearce: We have two other things, if the Court please. The matter of the attorney's fees and the Receiver's fees.

246 The Court: How much attorney's fee are you entitled to?

Mr. Pearce: I think we are entitled to 10% of the principal and interest which totals—

The Court: Does the note and mortgage fix the attorney fee?

Mr. Pearce: The note reads as follows: "The undersigned agrees in default herein and the placing of this note for collection or this note is collected through any court proceedings to pay a reasonable attorney's fee. Every endorser hereof waives presentment of payment and notice" and so forth and so on. This is in the original note.

Mr. Garner: Now, Your Honor, I would like to say this on behalf of my client. I never fight a lawyer's fee, but I would think that 10% would be a little bit stiff.

Mr. Pearce: I would say that the law prevents the 10% fee, and would like to request the court for 10% of whatever the Court thinks is appropriate. I think the Court is familiar as anyone else with the various difficulties

247 we have had in this case with the number of defendants in this case, and we will encounter the drafting of the decree.

Mr. Garner: Let me say this. The difficulty in this case is not—the fee in this case is going to be allowed against Ocie Rogers. Ocie Rogers has not given them one bit of trouble. As a matter of fact, all we have done is come in and admitted every step of the way that the principal was

there, that the interest was there, and we know we owe you, and we admitted it all along. The difficulty in the work that Mr. Pearce has done has been incurred with the United States Government and the other lienors, or purported lienors.

Mr. Wilder: I understand that the statute does not say a flat 10%. It says up to 10%.

The Court: Yes. I think 10% would be excessive. I am going to allow an attorney fee of $1250.00. Now the Receiver's fee. How much—

Mr. Pearce: The only suggestion we would have for the Court, if the Court please, on the Receiver's fee.
248 The Receiver has spent a great deal of time and effort on this matter. I think all parties are aware of that, in collecting these rents. I think the standard charge as a rental agent in Fort Smith is about 10%. So far as we are concerned, we think 10% fee would be the amount he is entitled to, and the amount that he has collected is $1775.00.

The Court: Would there be any objection to paying $175.00 Receiver's fee?

Mr. Garner: I am in no position to object to it. I don't know what work he has done, Your Honor. It has simply been a question of mailing in a check every month.

Mr. Pearce: Let me say this. He has had to call out there a number of times, he has had to write a number of letters, and I think he has handled some—

The Court: He has called me several times. I think it would be a reasonable fee. $175.00. Now then we are ready for the judgment. All right, the decree of
249 foreclosure of both the first and second mortgage, personal judgment in favor of the Pioneer American Insurance Company the sum of $17,439.87. Personal judgment in favor of the Development Company under the second mortgage in the sum of $2,056.70. Plaintiffs first and second mortgagors, Pioneer American Insurance Company will have a first lien. Leave that out for minute. Attorney's fee of $1250.00 to plaintiff's attorneys, $175.00 fixed as Receiver's fee. All of this to be a first lien on the property in favor of Pioneer American Insurance Co. And a second in favor of the Development Company. Next

in priority, Alfred J. Anderson in the sum of $206.36, 35 cents; and a fourth lien in priority in favor of the United States of America for $6,482.66. Everybody take exceptions to it.

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250 REPORTER'S CERTIFICATE

(Omitted in printing)

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251 IN THE CHANCERY COURT OF SEBASTIAN COUNTY, ARKANSAS, FORT SMITH DISTRICT

Court's Order Approving Bill of Exceptions—March 1, 1962

The foregoing typewritten matter is a true and correct transcription of the evidence adduced and the proceedings had before me at the time, place and in the cause mentioned in the caption page hereof.

IT IS, THEREFORE, in all things approved as the Bill of Exceptions in the case and is hereby ordered filed with the Clerk of the Court to be and become a part of the record on appeal to the Supreme Court of Arkansas.

SIGNED this 1st day of March, 1962.

HUGH M. BLAND
Hugh M. Bland, *Chancellor*

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254 (Clerk's Certificate to foregoing transcript omitted in printing)

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255 IN THE SUPREME COURT OF ARKANSAS

No. 2732

UNITED STATES OF AMERICA, *Appellant*

v.

PIONEER AMERICAN INSURANCE COMPANY, *Appellee.*

Appeal from Sebastian Chancery Court
Fort Smith District

AFFIRMED

Opinion—June 4, 1962

ED. F. MCFADDIN, Associate Justice

This appeal challenges a decree which held that an attorney's fee in the mortgage foreclosure suit was superior to the federal tax lien. Events and dates are as follows:

1. On May 24, 1956, The Development Company, Inc., for value received, executed a note for $20,000.00 secured by a mortgage on real estate in Sebastian County, Arkansas. The mortgage was duly filed and recorded on June 7, 1956; and, before maturity, the said indebtedness, together with the mortgage, was transferred to the appellee, Pioneer American Insurance Company of Dallas, Texas (hereinafter called "Pioneer"). The note bound the maker, ". . . in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." The mortgage securing the note

256 provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the said mortgage should become due for all purposes and there could be foreclosure in a court of competent jurisdiction.

2. By deed recorded March 18, 1958, The Development Company, Inc. sold the mortgaged real estate to Ocie A. Rogers and Florene W. Rogers, his wife, who assumed the mortgage and indebtedness held by Pioneer.

3. The Rogers failed to make the monthly payment in October, 1960, and all subsequent payments; and on March 24, 1961, Pioneer filed foreclosure for the balance due on the debt and interest, and also for a reasonable attorney's fee. The United States of America was made a defendant in the foreclosure suit because of the federal tax liens that had been filed against Ocie A. Rogers and Florene W. Rogers, the said liens having been filed on the dates and in amounts as follows:

November 29, 1960	$1776.65
January 30, 1961	1567.14
April 14, 1961	1288.96
July 17, 1961	1606.87
October 3, 1961	1148.69

4. The United States Government, by answer admitted its lien to be subordinate to the mortgage and interest, but claimed its tax lien to be superior to the attorney fee.

257 On November 11, 1961, the Chancery Court entered a decree of foreclosure which determined priority as between Pioneer and the United States Government, as follows:

> "The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, for all amounts it secures, including principal of the note and interest thereon; . . . and attorney's fees fixed by the court; . . ."

The decree in the Chancery Court also contains these statements which are submitted by appellant on this appeal:

> "The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned. . . . The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures . . . attorney's fee . . ."

So much for dates and background information. The United States Government (hereinafter sometimes called "Appellant") has appealed from so much of the Chancery decree as adjudged the attorney's fee allowed Pioneer in the sum of $1250.00 to be superior to the United
258 States' tax lien claims;[1] and the appellant relies on U. S. Code Annotated, Title 26, § 6321 *et seq.*; and also, *inter alia*,[2] the following cases: *U. S.* v. *New Britain*, 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367; *U. S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 95 L. Ed. 53, 71 S. Ct. 111; *U. S.* v. *Bond* (4th Cir.), 279 F. 2d 837 (*certiorari* denied by U. S. Supreme Court, 364 U.S. 895, 5 L. Ed. 2d 189, 81 S. Ct. 220); *U. S.* v. *Christensen* (9th Cir.), 269 F. 2d 624; and *In Re New Haven Clock & Watch Co.*, (2d Cir.), 253 F. 2d 577.

We recognize the power of the United States Government to legislate as to the rights to be accorded its tax liens; and we recognize the power of the United States Supreme Court to be the final arbiter in such cases
259 as this. Nevertheless, we do not consider any of the cases relied on by the appellant as completely decisive of the case at bar because of the matters that we now mention:

(A) Section 68-102 Ark. Stats., which is a part of the Negotiable Instruments Law,[3] states: "The sum payable is a sum certain . . . although it is to be paid: . . . (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

[1] There were other parties in the foreclosure suit and other lien claims involved; but there is no occasion to give details as to these matters because the only issue on this appeal by the United States Government is as stated in its brief: "Federal tax liens take priority over a mortgagee's lien for an attorney's fee incurred in a foreclosure proceeding, where the federal liens were recorded prior to the time lien for an attorney's fee became choate."

[2] Both sides have favored us with briefs containing scores of cases, all of which have been studied by us; but we list here those which are most strongly relied on by the appellant, and which have factual situations most similar to the case at bar.

[3] By Act No. 185 of 1961 Arkansas adopted the Uniform Commercial Code, effective January 1, 1962; and § 85-3-106 Ark. Stats. contains the provision of the Uniform Commercial Code similar to § 61-102 Ark. Stats. above quoted.

(B) The Arkansas Statute on attorneys' fees is Act No. 350 of 1951 (now found in § 68-910 Ark. Stats.), and reads: "A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a *contract of indemnity.*" (Emphasis supplied.)

(C) The United States Government conceded, in open court below, and conceded in its brief filed in this
260 Court, that its tax lien is subordinate to the mortgage and interest in full to date of payment. In accordance with the foreclosure decree, the mortgaged property was sold, and with the consent of the United States Government, Pioneer received the balance of its principal and all interest due to the date of such payment; and a further sum is now held in the Court to await the result of this litigation.

(D) The default in the payment of the note and mortgage held by Pioneer occurred in *October 1960;* and it was not until *November 1960* that the first tax lien of the United States Government was filed in this case.

We regard Paragraphs (A) to (D) above as, together, being sufficient to distinguish the case at bar from those relied on by the United States Government, as heretofore listed. In the New Britain case,[4] the United States Su-
preme Court spoke of the requirement that the lien
261 must be "choate".[5] The recording of the mortgage in 1956 put the world on notice that if there should be a default in payment of the note an attorney's fee would be added. There was such a default in October 1960 and the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and

[4] *U.S. v. New Britain*, 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367.

[5] Attorneys for Pioneer have quoted to us the language of the U. S. Supreme Court in the case of *Security Mtg. Co. v. Powers*, 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236, as regards when a lien becomes choate: "The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given. . . . When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication."

all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim.

We have carefully studied the case of *U. S.* v. *Bond*,[6] and also the Virginia statutes and cases[7] regarding attorneys' fees in foreclosure of mortgages since the case arose in Virginia; and we fail to find any statute in Virginia that is comparable to our Act. No. 350 of 1951 which says that the contract to pay attorneys' fee is a *contract of indemnity*. Such a statute in this State makes a difference between the Bond case and the case at bar.

262 In the case at bar the United States has conceded all the time that Pioneer is entitled to its *full debt and interest to date of payment*. Unless Pioneer gets its attorney's fee, it will not receive its full debt and interest, because the attorney's fee will have to be paid by Pioneer out of its debt and interest. So when the United States Government concedes—as it must under the adjudicated cases—that the prior mortgage is entitled to payment in full, it cannot expect the mortgagee to leave its attorney unpaid in the face of a statute which says that the attorney's fee is a contract of indemnity. In 27 Am. Jur. 471, "Indemnity" § 22, in discussing a contract of indemnity against liability, the text quotes the holdings: "In all actions on bonds of indemnity it must appear that the condition of the bond was broken, but, such fact appearing, the obligee is not obliged to wait until he is compelled to discharge the debt; *he may bring an action for a full recovery the moment the first breach happens in failing to perform the condition of the bond.*" (Emphasis supplied.)

There is another point that favors Pioneer's claim for attorney fees and which was not discussed in any of the cases cited and relied on by the United States Government in the case at bar; and that is the matter of
263 unjust enrichment. We find no holding directly in point, but we do find the general rules discussed in

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[6] *U. S.* v. *Bond* (4th Cir.), 279 F. 2d 837.

[7] Among others, there are: *Colley* v. *Summers*, 119 Va. 439, 89 S.E. 906; and *Cox* v. *Hagan*, 125 Va. 656, 100 S.E. 666.

American Law Institute's Restatement of the Law, "Restitution" § 103 *et seq.* on the topic on "Protection of Property". Pioneer employed attorneys, foreclosed the mortgage, caused a sale of the property and its conversion into money. The United States Government seeks to receive the money before the payment of the fee due the attorneys, whose efforts brought the money into Court. To allow such would violate the rules against unjust enrichment. While attorneys love their work, they do not work entirely for love. Someone must pay the fee: Pioneer employed attorneys after a default which had occurred before the United States ever filed a tax lien; and Pioneer proceeded to reduce the mortgaged property to cash. Under such facts the United States Government should not be allowed to assert a claim superior to the payment of the fee that Pioneer has paid to cause the mortgaged property to be reduced to cash and the proceeds readied for distribution, as they now are.

We are firmly of the opinion that in a court of equity Pioneer was entitled to prevail for its attorney's fee; and we therefore affirm the decree of the Sebastian Chancery Court.

HARRIS, C. J. dissent.

ED. F. MCFADDIN

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264 IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1961

UNITED STATES OF AMERICA, *Appellant*,

v.

PIONEER AMERICA INSURANCE COMPANY, *Appellee*.

Appeal from Sebastian Chancery Court,
Ft. Smith District

Judgment—June 4, 1962

This cause came on to be heard upon the transcript of the record of the chancery court of Sebastian County, Ft. Smith District, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is

no error in the proceedings and decree of said chancery court in this cause.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and National Surety Corporation, surety in the supersedeas bond filed in this cause, the sum of Twelve Hundred Fifty Dollars, with interest at six per cent per annum from the 15th day of November, A.D. 1961, the amount of decree in said chancery court.

It is further ordered and decreed that said appellee recover of said appellant and said surety all its costs in this Court and the court below in this cause expended, and have execution thereof.

HARRIS, C. J., dissents.

June 4, 1962

* * * * * * * * * * *

267 (Clerk's Certificate to foregoing transcript omitted in printing)

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268 SUPREME COURT OF THE UNITED STATES

No. 405 October Term, 1962

UNITED STATES, *Petitioner*,

v.

PIONEER AMERICAN INSURANCE COMPANY, ET AL.

Order Allowing Certiorari—November 19, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962—670341/P. O. 712

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

PIONEER AMERICAN INSURANCE COMPANY, THE DEVELOPMENT COMPANY, INC., AND ALFRED J. ANDERSON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arkansas.

OPINION BELOW

The decree of the Chancery Court of Sebastian County, Arkansas (R. 112–128), is not reported. The opinion of the Supreme Court of Arkansas (App. A, *infra*, pp. 10–20) is reported at 235 Ark. 267, 357 S.W. 2d 653.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on June 4, 1962. (App. A, *infra*, pp. 20–21.) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether federal tax liens are entitled to priority over the claim of a mortgagee for an attorney's fee incurred in prosecuting a foreclosure suit where notice of the federal tax liens was recorded prior to the entry of the judicial decree which allowed and determined the amount of the fee.

STATUTES INVOLVED

The provisions of Sections 6321, 6322 and 6323 of the Internal Revenue Code of 1954 and Sections 68–101, 68–102 and 68–910 of the Arkansas Statutes are set forth in App. B, *infra*, pp. 22–24.

STATEMENT

In 1958, the taxpayers (Ocie A. Rogers and Florence W. Rogers, his wife) purchased a parcel of real property in Sebastian County, Arkansas, assuming liability on a note, secured by a mortgage, held by the Pioneer American Insurance Company (R. 114–116). The note recited that the maker agreed, "in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee" (R. 15). The mortgage securing the note provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the mortgage would become due and the mortgage could be foreclosed (R. 115).

Taxpayers defaulted on the monthly payment due in October 1960, and all subsequent payments. On

March 24, 1961, Pioneer filed a suit to foreclose its mortgage, praying for a reasonable attorney's fee (R. 13–14). The United States was named a party defendant because of two outstanding liens for federal taxes assessed against the taxpayers, one having been filed on November 29, 1960, and the other on January 30, 1961 (R. 12). In its answer the United States admitted that its liens for taxes were subordinate to the lien of the mortgagee to the extent of principal and interest, but asserted its liens were superior to the lien of the mortgagee for an attorney's fee (R. 40–41, 106, 121). On November 9, 1961, in an amendment to its answer, the United States added three more tax liens filed on April 14, July 17, and October 3, 1961 (R. 110–111, 120).[1]

On November 11, 1961, the Chancery Court of Sebastian County entered a decree of foreclosure (R. 112–128) which provided for an attorney's fee of $1,250 and also determined priority as between Pioneer and the United States as follows (R. 122):

> The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, (for all amounts it secures, including principal of the note and interest thereon; * * * and attorney's fees fixed by the Court) * * *.

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[1] As found by the Chancery Court, the five liens of the United States by date of filing and amount are as follows (R. 120; see R. 40–41, 110–111, 234–235):

November 29, 1960	$ 559.52
January 30, 1961	1,567.14
April 14, 1961	1,288.96
July 17, 1961	1,606.87
October 3, 1961	1,148.69

This meant that the United States received $1,250 less on its claims than it would have.[2]

On appeal by the United States, the Supreme Court of Arkansas (Chief Justice Harris dissenting) affirmed the decree of the Chancery Court (App. A, *infra*, pp. 10–16, 16–20).

[2] The United States had also admitted that its liens were junior to a second mortgage on the property held by The Development Company, Inc., and the court held, in a ruling not challenged on appeal, that a mechanics lien held by Alfred J. Anderson (for $207.79) was also senior to the tax liens. The priorities thus established ahead of the tax liens were:

Pioneer American Insurance Company:	
Principal and interest	$17,570.70
Attorney fee	1,250.00
Development Company	2,071.10
Alfred J. Anderson	207.79
Total	21,099.59

If Pioneer's claim for the attorney's fee paid by it were held to be junior to the tax liens, the total of the claims prior to the tax liens would be reduced to $19,849.59, and the proceeds in excess of that amount would go to the United States. The distribution of the $19,849.59 set aside prior to the payment of the tax liens would then, however, be distributed among the other claimants according to their relative priorities under state law. If the state court applied the rules of priority enunciated in this case, Pioneer would still receive its entire claim of $17,570.70 for principal and interest plus the $1,250 for the attorney's fees; Development Company would recover only $1,028.89 of its claim under the second mortgage for $2,071.10; and Anderson would receive nothing on his mechanic's lien. The rights of the private parties *inter se* is, however, solely a question of state law not involved here; the only question presented by this petition is the inclusion of Pioneer's attorney-fee claim in the total of the claims entitled, under federal law, to priority over the tax lien. See *United States* v. *New Britain*, 347 U.S. 81, 88.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Arkansas has held that an attorney's fee which is determined and allowed to a mortgagee by the decree in a mortgage foreclosure suit is entitled, as a part of the mortgage debt, to priority of payment over federal tax liens which arose and notices of which were recorded against the mortgaged property prior to the decree. The decision is incorrect and is contrary to decisions of this and other courts.

1. The decision below is contrary to the decisions of this Court. Those decisions establish that, for a lien arising under state law to be entitled to priority over the federal tax lien created by Section 6321 of the Internal Revenue Code of 1954 (App. B, *infra*, p. 22), the competing lien must be "choate" at the time the tax lien arises and is recorded. *E.g., United States* v. *New Britain*, 347 U.S. 81, *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47. In turn, as *New Britain* and the numerous subsequent cases reaffirming that decision[3] establish, a lien does not become choate, for that purpose, until the identity of the lienor, the property subject to the lien, and the amount

[3] *United States* v. *Acri*, 348 U.S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215; *United States* v. *Scovil*, 348 U.S. 218; *United States* v. *Colotta*, 350 U.S. 808; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010; *United States* v. *Vorreiter*, 355 U.S. 15; *United States* v. *Ball Construction Co.*, 355 U.S. 587; *United States* v. *Hulley*, 358 U.S. 66; *Crest Finance Co.* v. *United States*, 368 U.S. 347. The decisions also establish that the doctrine of relation back cannot be applied to defeat the priority of federal liens. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50.

of the lien are fixed and certain. Since the amount of the mortgagee's lien for attorneys' fees was not fixed until after the filing of the five federal tax liens involved here, it was not entitled to priority over those liens.

Contrary to the suggestion of the court below (App. A, *infra*, p. 14), the mortgagee's lien for attorney's fees did not become choate upon the occurrence of a default in payment of the note for at that time neither the mortgagor's liability for nor the amount of the fee was certain. As Chief Justice Harris pointed out in his dissenting opinion (App. A, *infra*, p. 19), the terms of the note contemplate and Section 68–910 of the Arkansas Statutes (App. B, *infra*, p. 24) expressly provides that the note holder is entitled only to a reasonable attorney's fee for services actually rendered in enforcing payment. Here, the liability for payment of a fee became certain only after the services of an attorney were rendered sometime subsequent to the default, and the reasonable amount of the fee for the services actually performed was not determined until November 11, 1961, when the Arkansas Chancery Court entered its foreclosure decree and allowed and awarded the fee. This was more than a month after the last of the federal tax liens was filed of record.*

* There is no merit to the suggestion of the Arkansas Supreme Court (App. A, *infra*, pp. 14, 15) that Section 68–910 of the Arkansas Statutes (App. B, *infra*, p. 24), which makes a provision in a promissory note for payment of reasonable attorneys' fees for services actually rendered "enforceable as a contract of indemnity," renders the mortgagee's lien for fees choate at the time of a default. The purpose of the statute is to meet the contention of debtors that such a provision in a promissory note is void and not enforceable. The "contract of indem-

2. The decision is squarely in conflict with *United States* v. *Bond*, 279 F. 2d 837 (C.A. 4), certiorari denied, 364 U.S. 895; *In re New Haven Clock & Watch Co.*, 253 F. 2d 577, 583–584 (C.A. 2); and *Bank of America National Trust and Savings Assoc.* v. *Embry*, 188 C.A. 2d 425, 10 Cal. Rptr. 602 (C.A. 3d Dist.), in which the very question presented here was decided in favor of the priority of the federal tax liens.[5] Thus, in *Bond*, the Fourth Circuit held that the claim of a mortgagee for an attorney fee paid by it in protecting the lien of its mortgage had to be subordinated to priority of the federal tax liens, because (279 F. 2d at 846)—

> The fee was incurred long after the attachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt secured thereby, the future existence or amount of such attorney fee was, at best, speculative and uncertain.

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nity" label does not alter the federal test for choateness which requires that the amount of the lien be fixed.

Neither is there any merit to the majority's view (App. A, *infra*, pp. 15–16) that to allow the United States to receive payment for its tax liens, before payment of the fee due the attorney "would violate the rules against unjust enrichment," for this is not a situation where the attorney has created or increased the fund available for distribution. *Cf. Southern Railway Co.* v. *United States* (C.A. 5), decided July 19, 1962 (62-2 U.S.T.C., ¶ 9631).

[5] To the same effect, see *United States* v. *Ringler*, 166 F. Supp. 544 (N.D. Ohio). The case of *Security Mortgage Co.* v. *Powers*, 278 U.S. 149, cited by the court below (App. A, *infra*, p. 14, fn. 5), does not support the mortgagee's position. That case did not involve a federal tax lien and was thus not decided under the principles for determining priorities of liens which are applicable here.

3. The question presented affects a large number of property transactions throughout the country and is important to the administration of the internal revenue laws and to the collection of the federal revenue. The issue is potentially present in every mortgage foreclosure action in which the United States is named a party defendant. There were 3817 such cases during the fiscal year 1961–1962, and the issue may be expected to arise with the same or perhaps even greater frequency in the future. Despite what we believe to be the clear mandate of the holdings of this Court, *supra*, p. 5, the number of cases in which the United States is called upon to defend the priority of federal tax liens against claims by mortgagees for attorneys' fees continues to increase. A number of such cases in which the trial courts have subordinated the federal lien to later-arising claims for attorneys' fees are presently pending in federal and state appellate courts. *E.g., Western Montana Building & Loan Assn.* v. *Johnson,* (D. Mont.), decided February 14, 1962, pending on appeal by the United States to the Ninth Circuit; *United States* v. *First Federal Savings & Loan Assn. of St. Petersburg,* pending on appeal to District Court of Appeals of Florida for the Second District (No. 3258); and four unreported cases pending in the Illinois appellate courts—*E. A. Juzwik* v. *George W. Diener Mfg. Co.; Universal Mortgage & Investment Co.* v. *Wm. R. Lovell; Apollo Savings & Loan Assn.* v. *Wm. E. Burow; Mount Mayriv Cemetery Assn.* v. *Thomsen.*

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict between the decision of the highest court of Arkansas and the contrary decisions of Courts of Appeals for the Second and Fourth Circuits as well as to protect the integrity of the rules governing the priority of federal tax liens established by this Court.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH KOVNER,
GEORGE F. LYNCH,
Attorneys.

SEPTEMBER 1962.

APPENDIX A

UNITED STATES *v.* PIONEER AMERICAN INS. CO.

5-2732

Opinion delivered June 4, 1962.

ED. F. MCFADDIN, Associate Justice. This appeal challenges a decree which held that an attorney's fee in the mortgage foreclosure suit was superior to the federal tax lien. Events and dates are as follows:

1. On May 24, 1956, The Development Company, Inc., for value received, executed a note for $20,000.00 secured by a mortgage on real estate in Sebastian County, Arkansas. The mortgage was duly filed and recorded on June 7, 1956; and, before maturity, the said indebtedness, together with the mortgage, was transferred to the appellee, Pioneer American Insurance Company of Dallas, Texas (hereinafter called "Pioneer"). The note bound the maker, "* * * in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." The mortgage securing the note provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the said mortgage should become due for all purposes and there could be foreclosure in a court of competent jurisdiction.

2. By deed recorded March 18, 1958, The Development Company, Inc. sold the mortgaged real estate to Ocie A. Rogers and Florence W. Rogers, his wife,

who assumed the mortgage and indebtedness held by Pioneer.

3. The Rogers failed to make the monthly payment in October, 1960, and all subsequent payments; and on March 24, 1961, Pioneer filed foreclosure for the balance due on the debt and interest, and also for a reasonable attorney's fee. The United States of America was made a defendant in the foreclosure suit because of the federal tax liens that had been filed against Ocie A. Rogers and Florence W. Rogers, the said liens having been filed on the dates and in amounts as follows:

November 29, 1960	$1,776.65
January 30, 1961	1,567.14
April 14, 1961	1,288.96
July 17, 1961	1,606.87
October 3, 1961	1,148.69

4. The United States Government, by answer admitted its lien to be subordinate to the mortgage and interest, but claimed its tax lien to be superior to the attorney fee.

On November 11, 1961, the Chancery Court entered a decree of foreclosure which determined priority as between Pioneer and the United States Government, as follows:

"The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, for all amounts it secures, including principal of the note and interest thereon; * * * and attorney's fees fixed by the court; * * *"

The decree in the Chancery Court also contains these statements which are submitted by appellant on this appeal:

"The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned, * * *. The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures * * * attorney's fee * * *."

So much for dates and background information. The United States Government (hereinafter sometimes called "Appellant") has appealed from so much of the Chancery decree as adjudged the attorney's fee allowed Pioneer in the sum of $1,250.00 to be superior to the United States' tax lien claims[1]; and the appellant relies on U.S Code Annotated, Title 26, § 6321 *et seq.;* and also, *inter alia*[2], the following cases: *U.S.* v. *New Britain,* 347 U.S. 81, 98, L. Ed. 520, 74 S. Ct. 367; *U.S.* v. *Security Trust & Savings Bank,* 340 U.S. 47, 95 L. Ed. 53, 71 S. Ct. 111; *U.S.* v. *Bond* (4th Cir.), 279 F. 2d 837 (*certiorari* denied by U.S. Supreme Court, 364 U.S. 895, 5 L. Ed. 2d 189, 81 S. Ct. 220); *U.S.* v. *Christensen* (9th Cir.), 269 F. 2d 624; and *In Re New Haven Clock & Watch Co.,* (2d Cir.), 253 F. 2d 577.

We recognize the power of the United States

[1] There were other parties in the foreclosure suit and other lien claims involved; but there is no occasion to give details as to these matters because the only issue on this appeal by the United States Government is, as stated in its brief: "Federal tax liens take priority over a mortgagee's lien for an attorney's fee incurred in a foreclosure proceeding, where the federal liens were recorded prior to the time the lien for an attorney's fee became choate."

[2] Both sides have favored us with briefs containing scores of cases, all of which have been studied by us; but we list here those which are most strongly relied on by the appellant, and which have factual situations most similar to the case at bar.

Government to legislate as to the rights to be accorded its tax liens; and we recognize the power of the United States Supreme Court to be the final arbiter in such cases as this. Nevertheless, we do not consider any of the cases relied on by the appellant as completely decisive of the case at bar because of the matters that we now mention:

(A) Section 68–102 Ark. Stats., which is a part of the Negotiable Instruments Law,[3] states: "The sum payable is a sum certain * * * although it is to be paid: * * * (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

(B) The Arkansas Statute on attorneys' fees is Act No. 350 of 1951 (now found in § 68–910 Ark. Stats.), and reads: "A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a *contract of indemnity.*" (Emphasis supplied.)

(C) The United States Government conceded, in open court below, and conceded in its brief filed in this Court, that its tax lien is subordinate to the mortgage and interest in full to date of payment. In accordance with the foreclosure decree, the mortgaged property was sold, and with the consent of the United States Government, Pioneer received the balance of its principal and all interest due to the date of such payment; and a further sum is now held in the Court to await the result of this litigation.

[3] By Act No. 185 of 1961 Arkansas adopted the Uniform Commercial Code, effective January 1, 1962; and § 85–3–106 Ark. Stats. contains the provision of the Uniform Commercial Code similar to § 61–102 Ark. Stats. above quoted.

(D) The default in the payment of the note and mortgage held by Pioneer occurred in *October 1960;* and it was not until *November 1960* that the first tax lien of the United States Government was filed in this case.

We regard Paragraphs (A) to (D) above as, together, being sufficient to distinguish the case at bar from those relied on by the United States Government, as heretofore listed. In the New Britain case,[4] the United States Supreme Court spoke of the requirement that the lien must be "choate". The recording of the mortgage in 1956 put the world on notice that if there should be a default in payment of the note an attorney's fee would be added. There was such a default in October 1960 and the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim.[5]

We have carefully studied the case of *U.S.* v. *Bond,*[6] and also the Virginia statutes and cases[7] regarding

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[4] *U.S. v. New Britain*, 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367.

[5] Attorneys for Pioneer have quoted to us the language of the U.S. Supreme Court in the case of *Security Mtg. Co.* v. *Powers*, 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236, as regards when a lien becomes choate: "The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given . . . When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication."

[6] *U.S.* v. *Bond* (4th Cir.), 279 F. 2d 837.

[7] Among others, there are: *Colley* v. *Summers*, 119 Va. 439, 89 S.E. 906; and *Cox* v. *Hagan*, 125 Va. 656, 100 S.E. 666.

attorneys' fees in foreclosure of mortgages since the case arose in Virginia; and we fail to find any statute in Virginia that is comparable to our Act. No. 350 of 1951 which says that the contract to pay attorneys' fee is a *contract of indemnity*. Such a statute in this State makes a difference between the Bond case and the case at bar.

In the case at bar the United States has conceded all the time that Pioneer is entitled to its *full debt and interest to date of payment*. Unless Pioneer gets its attorney's fee, it will not receive its full debt and interest, because the attorney's fee will have to be paid by Pioneer out of its debt and interest. So when the United States Government concedes—as it must under the adjudicated cases—that the prior mortgage is entitled to payment in full, it cannot expect the mortgagee to leave its attorney unpaid in the face of a statute which says that the attorney's fee is a contract of indemnity. In 27 Am. Jur. 471, "Indemnity" § 22, in discussing a contract of indemnity against liability, the text quotes the holdings: "In all actions on bonds of indemnity it must appear that the condition of the bond was broken, but, such fact appearing, the obligee is not obliged to wait until he is compelled to discharge the debt; *he may bring an action for a full recovery the moment the first breach happens in failing to perform the condition of the bond.* (Emphasis supplied.)

There is another point that favors Pioneer's claim for attorney fees and which was not discussed in any of the cases cited and relied on by the United States Government in the case at bar; and that is the matter of unjust enrichment. We find no holding directly in point, but we do find the general rules discussed in American Law Institute's Restatement of the Law,

"Restitution" § 103 et. seq. on the topic on "Protection of Property". Pioneer employed attorneys, foreclosed the mortgage, caused a sale of the property and its conversion into money. The United States Government seeks to receive the money before the payment of the fee due the attorneys, whose efforts brought the money into Court. To allow such would violate the rules against unjust enrichment. While attorneys love their work, they do not work entirely for love. Someone must pay the fee: Pioneer employed attorneys after a default which had occurred before the United States ever filed a tax lien; and Pioneer proceeded to reduce the mortgaged property to cash. Under such facts the United States Government should not be allowed to assert a claim superior to the payment of the fee that Pioneer has paid to cause the mortgaged property to be reduced to cash and the proceeds readied for distribution, as they now are.

We are firmly of the opinion that in a court of equity Pioneer was entitled to prevail for its attorney's fee; and we therefore affirm the decree of the Sebastian Chancery Court.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice (Dissenting Opinion). I cannot agree with the Majority opinion, for I am unable to distinguish the facts in the case at bar from those in *U.S.* v. *Bond*, 279 F. 2d 837 (C.A. 4th), and *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C.A. 2nd). I do not consider that discussion of those cases is necessary, for brief quotations from the opinions will suffice to explain my views. In *Bond*, the court said:

"For the same reasons, we must subordinate to priority of the federal tax liens the claim for an attorney fee paid by Perpetual in protection of the lien of its mortgage. The fee was incurred long after the at-

tachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt secured thereby, the future existence or amount of such attorney fee, was, at best, speculative and uncertain."

In *New Haven*, that court said:

"The Bank sought an order in the District Court including an award of reasonable attorney's fees because the Clock Company, in the assignment contract, agreed 'to reimburse the Bank for any and all legal and other expenses incurred in and about the checking, handling and collection of the accounts hereby assigned to the Bank and the preparation and enforcement of any agreement relating thereto.' The Government, in its oral argument before this Court and in its brief, opposed this claim on the ground that the United States, acting pursuant to Sections 3670 and 3671 of the Internal Revenue Code of 1939, and Sections 6321 and 6322 of the Internal Revenue Code of 1954, 26 U.S.C. §§ 6321, 6322, had a tax lien on the proceeds of the assigned accounts which was prior to the 'inchoate' lien of the Bank. Since the amount of the Bank's lien for attorney's fees was unknown at the time of the Clock Company's petition for reorganization, this lien was 'inchoate' in the sense used to determine its priority as against a United States tax lien. *United States* v. *City of New Britain*, 347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520. Thus, the Government's lien is superior to the claim for attorney's fees if the United States has complied with the aforementioned provisions of the Internal Revenue Codes and in addition has filed the notice of the lien as required * * *." Here, there is no dispute that the lien was properly filed and recorded.

The Majority apparently depend in large measure upon the fact that our statute provides that a reason-

able attorney's fee is enforceable as a contract of indemnity. In my view, this provision lends no weight to the position taken by the Majority. The sole question here is *when* the insurance company's lien for attorney's fees came into existence, *i.e.*, did the attorney's fee become choate before the Government filed its lien claim? There was a default on the note in October, 1960,[8] and the Majority state:

"* * * the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim."

The question, in my view, is not when the company became entitled to enforce the provision for an attorney's fee, but rather, when it actually did enforce it. I emphatically disagree with the statement of the Majority, for I cannot see that the company was due to add the attorney's fee *immediately upon default.* Debtors frequently are a few days late in making payments, but no one would contend that this permits a note holder to add an attorney's fee. The default in payments on this note occurred in October, but I daresay that if Rogers had subsequently made the October payment, and the other payments, no foreclosure suit would have been filed. Certainly, if delinquent payments had been made and accepted by the company, it would not be contended that Pioneer should be permitted to add an attorney's fee. In such event, there would have been no occasion to enforce any contract for indemnity, for there would have been no loss.

[8] The first two federal tax liens were recorded in November, 1960, and January of 1961.

While the default occurred in October, 1960, *the foreclosure suit was not filed until March 24, 1961.* The claim for attorney's fee can only be enforced by court action, and though I am primarily of the opinion that an attorney's fee would not have priority over the Government's tax liens until it had been definitely fixed by the court, (prior to the recording of the liens) still, if that be error, then certainly I can see no possible priority for the attorney's fee until a suit is filed asking for the fee. Both the filing of the complaint, and the order fixing the fee, occurred after the recording of the federal tax liens. The note provides:

"The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee."

Our statute, quoted by the Majority, also provides that the attorney's fee is enforceable "for services actually rendered." Therefore, under the language of both the note and the statute, *a default in payment is not sufficient to enable the note holder to add an attorney's fee;* services actually rendered by an attorney (generally the filing of a suit) are necessary. But, if it be said that an attorney could render service in trying to collect payments on the note before actually instituting any suit, I point out that this record is silent as to *when* this matter was placed in the hands of the attorneys for Pioneer. *There is no evidence that appellee's attorneys rendered any service relative to collection of the note prior to the filing of the foreclosure complaint.*

The Majority state that to allow the Government to recover the amount sought would "violate the rules against unjust enrichment." I personally find no

merit in this contention. The Government has its attorneys, and I am quite sure, would have been only too glad to have brought its own proceeding for sale of the property to satisfy the tax liens if such action would have given it priority over appellee.

While I have commented to some extent relative to statements in the Majority opinion, this dissent is primarily based on the holdings in the *Bond* and *New Haven* cases, a reading of which persuades me that the lien for attorneys' fee did not become choate until a definite, fixed amount was allowed by the court. As previously stated, this, of course, was long after the recording of the federal tax liens.

I accordingly feel that the Government should prevail in its contention, and respectfully dissent.

IN THE SUPREME COURT OF ARKANSAS

October Term 1961. June 4, 1962

UNITED STATES OF AMERICA, APPELLANT, *v.* PIONEER AMERICAN INSURANCE COMPANY, APPELLEE. Appeal from Sebastian Chancery Court, Ft. Smith District

JUDGMENT

This cause came on to be heard upon the transcript of the record of the chancery court of Sebastian County, Ft. Smith District, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and National Surety Corporation,

surety in the supersedeas bond filed in this cause, the sum of Twelve Hundred Fifty Dollars, with interest at six per cent per annum from the 15th day of November, A.D. 1961, the amount of decree in said chancery court.

It is further ordered and decreed that said appellee recover of said appellant and said surety all its costs in this Court and the court below in this cause expended, and have execution thereof.

HARRIS, C. J., dissents.

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or Territorial Laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; * * *

* * * * * *

6A Arkansas Statutes, Annotated (1947 ed., 1957 Replacement):

68–101. *Requirements for negotiability.*—An instrument to be negotiable must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer;

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

68–102. *Sum certain—Definition.*—The sum payable is a sum certain within the meaning of the Act, although it is to be paid:

(1) With interest; or

(2) By stated instalments; or,

(3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or,

(4) With exchange, whether at a fixed rate or at the current rate; or,

(5) With costs of collection or any attorney's fee, in case payment shall not be made at maturity.

68–910. *Attorney's fee—Provision enforceable.*—A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent [10%] of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity.

U.S. GOVERNMENT PRINTING OFFICE: 1952

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 405

UNITED STATES OF AMERICA, PETITIONER

v.

PIONEER AMERICAN INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decree of the Chancery Court of Sebastian County, Arkansas (R. 35–48) is not reported. The opinion of the Supreme Court of Arkansas (R. 72–77) is reported at 235 Ark. 267, 357 S.W. 2d 653. The dissenting opinion of Chief Justice Harris, inadvertently omitted from the printed record, is set forth in Appendix A, *infra*, pp. 23–26.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on June 4, 1962 (R. 77–78). The petition for a writ of certiorari was filed on September 4, 1962, and was granted on November

19, 1962 (R. 78; 371 U.S. 909). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether federal tax liens are entitled to priority over the claim of a mortgagee for an attorney's fee incurred in prosecuting a foreclosure suit where notice of the federal tax liens was recorded prior to the entry of the judicial decree which allowed and determined the amount of the fee.

STATUTES INVOLVED

Sections 6321, 6322 and 6323 of the Internal Revenue Code of 1954 and Sections 68–101, 68–102 and 68–910 of the Arkansas Statutes are set forth in Appendix B, *infra*, pp. 27–29.

STATEMENT

In 1958, the taxpayers (Ocie A. Rogers and Florence W. Rogers, his wife) purchased a parcel of real property in Sebastian County, Arkansas, assuming liability on a note, secured by a mortgage, held by respondent Pioneer American Insurance Company ("Pioneer") (R. 72). In the note the maker agreed—

> in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee [R. 7].

The mortgage provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the

indebtedness secured by the mortgage would become due and the mortgage could be foreclosed (R. 13, 72).

Taxpayers defaulted on the monthly payment due in October 1960, and on all subsequent payments (R. 73). On March 24, 1961, Pioneer filed a suit to foreclose its mortgage, and sought a reasonable attorney's fee (R. 1–6). The United States was named a party defendant because of two outstanding liens for federal taxes assessed against the taxpayers, notice of one having been filed on November 29, 1960, and of the other on January 30, 1961 (R. 4–5, 73). In its answer (R. 20–21) the United States admitted that its liens for taxes were subordinate to the lien of the mortgagee to the extent of principal and interest, but asserted that its liens were superior to the lien of the mortgagee for an attorney's fee. On November 9, 1961, the United States amended its answer to include three additional tax liens that had been filed on April 14, July 17, and October 3, 1961 (R. 34, 73).[1]

On November 15, 1961, the Chancery Court of Sebastian County entered a decree of foreclosure (R. 35–48) which fixed an attorney's fee of $1,250 (R.

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[1] The amounts of the tax liens were as follows (R. 73):

November 29, 1960	$1,776.65
January 30, 1961	1,567.14
April 14, 1961	1,288.96
July 17, 1961	1,606.87
October 3, 1961	1,148.69

As of November 15, 1961, when the Chancery Court entered its decree, the total amount due on all the tax liens, including interest and filing fees, was $6,482.66 (R. 41, 44, 64). See note 3, *infra*.

43, 45) and determined priority between Pioneer and the United States as follows (R. 42).

> The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, (for all amounts it secures, including principal of the note and interest thereon; * * * and attorney's fees fixed by the Court) * * *[2]

The effect of this ruling was to give the United States $1,250 less on its tax claims than it would have received had those claims been given priority over the attorney's fee.

In accordance with the foreclosure decree, the mortgaged property was sold, and with the consent of the United States, Pioneer received the balaiffe of its principal and all interest due to the date of such payment.[3] The sum of $3,822.38, however, has been retained by the Chancery Court to await the result

[2] The United States had also admitted that its liens were junior to a second mortgage on the property held by The Development Company, Inc., and the court held, in a ruling not challenged on appeal, that a mechanics lien held by Alfred J. Anderson was also senior to the tax liens. (R. 39–40.)

[3] The proceeds of the sale plus rents paid during the foreclosure proceedings amounted to $25,411.67. (R. 51.) The costs of sale were $257.55, leaving a balance of $25,154.12 which the court directed to be distributed as follows (R. 51–52):

Pioneer American Insurance Company: Principal and interest	$18,764.33
Bethel & Pearce, attorneys for Pioneer	1,250.00
The Development Company, Inc	2,064.93
Alfred J. Anderson	207.18
Remainder to the United States	2,867.38

of this litigation. Of this amount, $2,572.18 are funds of the United States, and the balance ($1,250) represents the amount in controversy. (R. 49, Appendix C, pp. 30–31.)[4]

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[4] The federal tax liens, as of the date of the order of distribution, were as follows (R. 64–65):

Lien of November 29, 1960	$659.67
Lien of January 30, 1961	1,661.03
Lien of April 14, 1961	1,344.69
Lien of July 17, 1961	1,653.23
Lien of October 3, 1961	1,164.04

Under the priorities fixed by the Chancery Court, the first two federal liens, amounting to $2,320.70, would be paid in full and $546.68 would be available for partial payment of the third lien of $1,344.69. If the federal liens are given priority over the attorney's fee, an additional $1,250.00 would be available for distribution to the United States. This sum would satisfy the remaining $798.01 due in the third lien, plus a portion of the fourth lien. At the same time, $1,250.00 less would be available for distribution to the prior claimants. If the Chancery Court granted the same priorities to Pioneer Development Company and Anderson that it applied in the present case—and their relative priorities vis-a-vis each other is a matter of State law—Pioneer would receive its entire claim for principal and interest, together with $1,250.00 for the attorney's fee; Development Company would receive $1,022.14 on its claim for $2,064.93 under the second mortgage; and Anderson would receive nothing on his mechanics' lien claim of $207.18.

If the Court accepts our argument that the federal liens have priority over the attorney's fee, the foregoing figures may have to be adjusted to reflect the interest that has accrued on the federal tax claims since the entry of the foreclosure decree in November 1961.

While the decree provided for the payment of the attorney's fee (R. 53–55), the supersedeas bond filed in connection with

On appeal by the United States, the Supreme Court of Arkansas (Chief Justice Harris dissenting) affirmed the decree of the Chancery Court (R. 72–78; App. A, *infra*, pp. 23–26).

SUMMARY OF ARGUMENT

A. Under the Internal Revenue Code, the United States has a perfected, choate lien against all property of the taxpayer. The lien arises when the tax is assessed, but it is not valid against mortgagees until it has been recorded. The federal lien has priority over a prior State-created lien unless the latter, too, is choate. For a State-created lien to be "choate" in the federal sense so that it has priority over a federal lien, "the amount of the lien [must be] established." *United States* v. *New Britain*, 347 U.S. 81, 84.

Pioneer's lien for attorney's fees incurred in foreclosing the mortgage was not a choate or perfected lien at the time the federal tax liens arose and therefore was not entitled to priority over them. The note, secured by the mortgage, did not obligate the maker to pay any specific amount as an attorney's fee, but merely to pay a reasonable fee in the event of default and the institution of proceedings for collection (R. 7). The amount of any such fee could not be established until it was fixed by a court decree;

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the appeal to the Supreme Court of Arkansas shows that the Chancery Court has retained the $1,250.00 representing such fee. A copy of the bond is set forth in Appendix C, *infra*, pp. 30–31.

and that did not take place until the Chancery Court entered its foreclosure decree on November 15, 1961, which was subsequent to the date on which the last of the federal tax liens had been recorded (October 3, 1961).

B. The fact that Arkansas permits provisions in promissory notes for the payment of attorneys' fees to be enforced as contracts of indemnity does not justify giving liens for such fees priority over earlier-perfected federal tax liens. The mere act of default did not entitle the maker to an attorney's fee: he became entitled to a fee only if collection proceedings were instituted, and then only in such amount as the court fixed. Pioneer could enforce its claims for attorney's fees only as a contract of indemnity, and it was not entitled to indemnity until the amount of the attorney's fee had been determined. When this took place on November 15, 1961, the federal liens had already been perfected, and they could not be displaced by the subsequently perfected State-created lien.

C. Nor can attorneys' fees be given priority as an expense of foreclosure on the theory that the attorneys were responsible for creating the fund out of which the competing claims were satisfied. First, the services of the attorneys in conducting the foreclosure proceedings did not create a "fund" in the sense that attorneys do when they successfully prosecute and recover judgment on a claim for damages; the attorneys did not bring into existence any new asset, but

merely changed from real property to money the form of the asset from which the claims were to be satisfied. Second, the services were all performed at the behest of, and for the benefit of, the mortgagee, in order to protect its financial interest in the property, which was adverse to that of the United States. The suggestion of the Supreme Court of Arkansas that the attorney's fee should be given priority over the federal tax lien because otherwise the payment of such fee by Pioneer will deny it its full claim, is fully answered by this Court's recent decision in *United States* v. *Buffalo Savings Bank*, No. 96, this Term, decided January 7, 1963. There the Court rejected a similar argument in holding that a State cannot give local real estate taxes priority over a federal tax lien by treating them as expenses of sale incurred in the foreclosure of a mortgage which was concededly senior to the federal lien.

ARGUMENT

A FEDERAL TAX LIEN HAS PRIORITY OVER A MORTGAGEE'S LIEN FOR AN ATTORNEY'S FEE, NOT FIXED IN AMOUNT UNTIL AFTER THE FEDERAL LIEN WAS PERFECTED, WHICH WAS INCURRED IN FORECLOSING A MORTGAGE PRIOR TO THE FEDERAL LIEN

The Supreme Court of Arkansas held that an attorney's fee which is awarded to a mortgagee by a decree in a mortgage foreclosure suit is entitled, as part of the mortgage debt, to priority of payment over federal tax liens which arose and were perfected prior to the decree. This ruling is contrary

to the settled principles governing the relative priority between federal tax liens and State-created liens, because it permits an inchoate State lien to rank ahead of a perfected federal lien.

A. THE LIEN FOR AN ATTORNEY'S FEE WAS NOT PERFECTED UNTIL THE FEE WAS AWARDED AND FIXED BY THE CHANCERY COURT, AND THE EARLIER-PERFECTED FEDERAL LIEN THEREFORE HAS PRIORITY

The principles governing the priority of federal tax liens have been frequently stated by this Court, and need not be repeated at length. In brief, the Internal Revenue Code gives the United States a lien for unpaid taxes upon "all property and rights to property, whether real or personal" of the taxpayer; the lien arises when the assessment is made; but it is not valid against mortgagees, pledgees, purchasers or judgment creditors until it has been recorded (Sections 6321, 6322 and 6323 of the Internal Revenue Code of 1954, *infra*, pp. 27-28). The federal tax lien, although general, is a perfected, choate lien as soon as it arises, and it cannot be defeated by a prior state-created lien unless the latter, too, is choate. Since

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[5] *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Waddill Co.*, 323 U.S. 353; *Illinois* v. *Campbell*, 329 U.S. 362; *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47; *United States* v. *New Britain*, 347 U.S. 81; *United States* v. *Aeri*, 348 U.S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215; *United States* v. *Scovil*, 348 U.S. 218; *United States* v. *Colotta*, 350 U.S. 808, reversing *per curiam*, 224 Miss. 33, 79 S. 2d 474; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing *per curiam*, 227 F. 2d 359 (C.A. 7); *United States* v.

the priority of a federal lien is always a federal question, this Court is not bound by a State court's characterization of a State lien as perfected.[6] If the federal and State liens are both choate, then their priority is determined by the rule that "the first in time is the first in right";[7] but if the earlier State lien is inchoate, the subsequent federal lien has priority.[8] The subsequently-perfected State lien cannot be "related back" to the time of its creation to defeat the federal lien.[9]

For a State-created lien to be "choate" in the federal sense so that it has priority over a federal lien, three conditions must be satisfied: "[1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien [must be] established." *United States* v. *New Britain*, 347 U.S. 81, 84; see *Illinois* v. *Campbell*, 329 U.S. 362, 375. All three of these requirements must be met before the lien is perfected; the failure in any one respect makes

Vorreiter, 355 U.S. 15, reversing *per curiam*, 134 Colo. 543, 307 P. 2d 475; *United States* v. *Ball Construction Co.*, 355 U.S. 587, reversing *per curiam*, 239 F. 2d 384 (C.A. 5); *United States* v. *Hulley*, 358 U.S. 66, reversing *per curiam*, 102 S. 2d 599 (Fla.); *United States* v. *Buffalo Savings Bank*, No. 96, this Term, decided January 7, 1963; cf. *Crest Finance Co.* v. *United States*, 368 U.S. 347.

[6] *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 49; *United States* v. *Gilbert Associates*, 345 U.S. 361; *United States* v. *Acri*, 348 U.S. 211, 213.

[7] *United States* v. *New Britain*, 347 U.S. 81, 85–86.

[8] See the cases cited note 5, *supra*.

[9] *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 50

the State lien junior to the federal lien. *Illinois* v. *Campbell, supra.*

Under these settled principles, Pioneer's lien for attorney's fees incurred in foreclosing the mortgage plainly was not a choate or perfected lien at the time the federal tax liens arose, and it was therefore not entitled to priority over them. When the federal liens arose, the amount of the lien for attorney's fees was not established. On the contrary, "the fact and the amount of the lien were contingent upon" the possible future initiation of a foreclosure action and "upon the outcome of [such] suit" (*United States* v. *Acri*, 348, U.S. 211, 214).

The note, secured by the mortgage, did not obligate the maker to pay any specific amount as an attorney's fee, but merely to pay a "reasonable" fee in the event of default and the institution of proceedings for collection (R. 7). The amount of such fee, if any, could and would not be established until it was fixed by a court decree; and that did not take place until the Chancery Court entered its foreclosure decree on November 15, 1961, which was subsequent to the date on which the last of the federal tax liens had been recorded (October 3, 1961; see note 1, *supra*). Thus, the lien for the attorney's fee was not choate, in the federal sense, at the time the federal liens arose and were filed; and the federal liens therefore had priority over the subsequently-perfected lien for the attorney's fee.

The majority of the federal courts (including the two courts of appeals which have decided the ques-

tion), as well as various State courts, have upheld the priority of a federal tax lien over a lien for an attorney's fee, not fixed until after the federal lien was perfected, which was incurred in foreclosing a mortgage prior to the federal lien. *United States* v. *Bond*, 279 F. 2d 837 (C.A. 4), certiorari denied, 364 U.S. 895; *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C.A. 2); *United States* v. *Ringler*, 166 F. Supp. 544 (N.D. Ohio); *United States* v. *Lorton* (E.D. Ill.), decided December 14, 1961 (1962-1 U.S.T.C., par. 9490); *First State Bank of Medford* v. *United States*, 166 F. Supp. 204 (D. Minn.); *Bank of America* v. *Embry*, 188 Cal. App. 2d 425, 10 Cal. Rptr. 602; and see *American Surety Co.* v. *Sunkberg*, 58 Wash. 2d 337, 363 P. 2d 99, certiorari denied, 368 U.S. 989.[10] As the court explained in *Bond*, in words that are equally applicable to the present case (279 F. 2d at 846):

> The fee was incurred long after the attachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt secured thereby, the future existence or amount of such attorney fee was, at best, speculative and uncertain.

[10] Contra: *Streeter Brothers* v. *Overfelt*, 202 F. Supp. 143 (D. Mont.); *Western Montana Building & Loan Assn.* v. *Johnson*, unreported (D. Mont.), pending on appeal, C.A. 9, No. 18023; *Lumbermen's Underwriting Alliance* v. *Fall Creek Box & Manufacturing Co.* (D. Ore.), decided October 16, 1962 (1962-2 U.S.T.C., par. 9795). The proceedings before the Ninth Circuit in the *Johnson* case have been stayed pending the outcome in the present case. There have also been several unreported State trial court decisions which have given the attorney's fee priority over the federal lien.

The Supreme Court of Arkansas apparently relied on *Security Mortgage Co. v. Powers*, 278 U.S. 149, as indicating that the lien for attorneys' fees became choate prior to the perfection of the federal liens (R. 75). The *Powers* case does not so indicate. It did not involve the priority of a federal tax lien at all. The question there was whether a mortgagee's claim for an attorney's fee of ten percent, provided for in the note which the mortgage secured, could be enforced in the bankruptcy proceedings against the proceeds of the sale of the mortgaged property. This Court, in reversing the lower courts' disallowance of the claim, ruled (1) that the validity of the lien claimed by the mortgagee for attorney's fees "must be determined" by State law (p. 153); that the enforcibility of the liability for attorney's fees against the proceeds of the sale raised "federal questions peculiar to the law of bankruptcy" (p. 154); and that nothing in the Bankruptcy Act barred enforcement of the claim (pp. 155–160). In rejecting the view, which certain lower federal courts had adopted, that the liability could not be enforced because it was contingent at the time of the adjudication in bankruptcy, the Court stated (p. 156):

> We find nothing in the Bankruptcy Act to justify such a refusal. The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given. Property subject to a lien to secure a liability still contingent at the time of bankruptcy is not discharged from the lien by the adjudication.

> * * * When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable though this occurs after the adjudication. [Footnote omitted.]

The statement that the lien for attorney's fees "had already become perfect when the principal note and the loan deed securing it were given" must be read in the light of the question before the Court, namely, whether the enforcement of the claim for attorney's fees against the proceeds of the sale of the mortgaged property was barred by the Bankruptcy Act. As we read the opinion, the Court ruled only that, either as a matter of State law or of federal bankruptcy law, the lien for attorney's fees, though contingent, was not inchoate at the time of the adjudication in bankruptcy. The Court recognized that the liability represented by the promise to pay attorney's fees was "still contingent at the time of bankruptcy" but subsequently became "absolute" and "enforceable." *Powers* was decided before this Court developed the doctrine of the choate lien for federal tax purposes (see note 5, *supra*, pp. 9–10). The statement in *Powers* with respect to the choateness of a contingent lien in bankruptcy cannot be read as qualifying the long line of subsequent decisions in which this Court held that a State-created lien is not choate, as against the federal tax lien, until its amount has been fixed.

B. THE FACT THAT ARKANSAS TREATS PROVISIONS IN PROMISSORY NOTES TO PAY ATTORNEYS' FEES AS CONTRACTS OF INDEMNITY DOES NOT JUSTIFY GIVING LIENS FOR SUCH FEES PRIORITY OVER FEDERAL TAX LIENS

The Supreme Court of Arkansas, relying on the fact that under Arkansas law[11] a provision in a promissory note for the payment of an attorney's fee is enforcible as a contract of indemnity, ruled that when the first default in payment took place in October, 1960, the holder of the note could immediately enforce the contract of indemnity; and that since such default occurred prior to the filing of the first federal tax lien notice on November 29, 1960, "the right for attorney's fee became choate before the United States Government filed its lien claim" (R. 75–76). As we have already shown, however, the lien for the attorney's fee did not become choate under federal law until the amount of the fee was fixed by the decree of the Chancery Court on November 15, 1961, which was after the last federal lien had been perfected. Moreover, as Chief Justice Harris pointed out in his dissenting opinion (App. A, *infra*, p. 25, emphasis in original), the question

> is not when the company became entitled to enforce the provision for an attorney's fee, but rather, when it actually did enforce it. I emphatically disagree with the statement of the Majority, for I cannot see that the company was due to add the attorney's fee *immediately upon default*. Debtors frequently are a few

[11] Section 68–910, Arkansas Statutes, Annotated, App. B, *infra*, p. 29.

days late in making payments, but no one would contend that this permits a note holder to add an attorney's fee. The default in payments on this note occurred in October, but I daresay that if Rogers had subsequently made the October payment, and the other payments, no foreclosure suit would have been filed. Certainly, if delinquent payments had been made and accepted by the company, it would not be contended that Pioneer should be permitted to add an attorney's fee. In such event, there would have been no occasion to enforce any contract for indemnity, for there would have been no loss.

Furthermore, as Justice Harris also noted (*id.*, p. 25), the "claim for attorney's fee can only be enforced by court action." See *First State Bank of Medford* v. *United States*, 166 F. Supp. 204 (D. Minn.). The Arkansas statute validates a provision in a promissory note for the payment of an attorney's fee, not to exceed ten percent of the principal due (plus accrued interest), "for services actually rendered in accordance with its terms."[12] The note in the present case calls for payment of "a reasonable attorney's fee" in the event of default and of "the placing of this note in the hands of an attorney for collection, or this note is collected through any court

[12] Prior to the enactment of this statute in 1951, Arkansas law treated provisions in notes, mortgages and deeds of trust for the payment of attorney's fees as unenforcible penalty provisions. See *Boozer* v. *Anderson*, 42 Ark. 167; *Arden Lumber Co.* v. *Henderson Iron Works & Supply Co.*, 83 Ark. 240, 103 S.W. 185; see, also, *Holloway* v. *Pocahontas Federal Savings & Loan Assn.*, 230 Ark. 310, 323 S.W. 2d 204.

proceedings" (R. 7). Thus, a default itself would not obligate the maker to pay an attorney's fee; the obligation only arose if thereafter an attorney was retained to collect the note, and then only to the extent of a reasonable fee for the services actually rendered.

Pioneer could enforce the obligation to pay an attorney's fee only as a contract of indemnity. But the amount of indemnity, if any, to which Pioneer would be entitled could not be determined until after default, (1) an attorney had been retained, and (2) the amount of his fee had been finally fixed by the court. Neither of these conditions had been met when the default occurred in October, 1960. While the filing of the foreclosure suit on March 24, 1961, satisfied the first condition, the second condition was not satisfied until almost eight months later, when the Chancery Court on November 15, 1961, finally fixed the attorney's fee at $1250.00. As of the latter date, as we have noted, the federal liens had already been perfected, and they could not be displaced by the subsequently-perfected State-created lien.

C. THE ATTORNEY'S FEE IS NOT ENTITLED TO PRIORITY OVER THE FEDERAL LIEN AS AN EXPENSE OF FORECLOSURE.

The Supreme Court of Arkansas gave another ground for awarding the attorney's fee priority over the federal tax lien: Since the attorneys' "efforts brought the money into Court," it "would violate the rules against unjust enrichment" to allow the United States "to assert a claim superior to the payment of the fee that Pioneer has paid to cause the mortgaged

property to be reduced to cash and the proceeds readied for distribution, as they now are" (R. 77). But to frame the issue in terms of unjust enrichment assumes the answer. If, as we contend, the federal lien has priority, no unjust enrichment of the United States results from recognizing such priority. The real inquiry on this point, we believe, is whether the attorney's fee may properly be treated as an expense of foreclosure on the theory that the attorneys were responsible for creating the fund out of which the competing claims are to be satisfied. We think the answer is clearly negative.

First, the services of the attorneys in instituting and conducting the foreclosure proceedings did not create a "fund" in the sense that attorneys do when they successfully prosecute and recover judgment on a contested claim for damages. In the latter situation the attorneys bring into being an asset that, were it not for their services, would never have existed.[11] In the present case, however, all the attorneys did was to liquidate and convert into money the security for the debt; the foreclosure proceedings merely changed from real property to money the form of the assets out of which the claim would be paid. There is no indication, or even suggestion, that the attorneys' services in any way increased the total amount available for distribution. Cf. *Southern Railway Co.* v. *United States*, 306 F. 2d 119 (C.A. 5).

[11] There is no occasion to consider or decide in this case whether, and in what circumstances, a fee for such legal services might be given priority over a federal tax lien.

Second, the services which the attorneys for Pioneer performed in the foreclosure proceedings were all rendered at the behest of, and for the benefit of, their client, the mortgagee, in order to protect its financial interest in the property, which was adverse to that of the United States. Indeed, the United States participated in the proceedings through its own attorney, in order to protect its interests. Hence there is no reason why an exception to the choate lien doctrine should be made in favor of mortgagees seeking priority for attorney's fees incurred in foreclosing on their security interest.

The Supreme Court of Arkansas noted (R. 76) that the United States had conceded that Pioneer has priority for its full debt and interest, and it stated (*ibid.*) that "[u]nless Pioneer gets its attorney's fee, it will not receive its full debt and interest, because the attorney's fee will have to be paid by Pioneer out of its debt and interest." This Court, however, recently rejected a similar argument in holding that a State cannot give local real estate taxes priority over a federal tax lien by treating them as expenses of sale incurred in the foreclosure of a mortgage which was concededly senior to the federal lien. *United States* v. *Buffalo Savings Bank*, No. 96, this Term, decided January 7, 1963. In that case the New York Court of Appeals, in granting the local liens priority, had reasoned as follows (*Buffalo Savings Bank* v. *Victory, et al.*, 11 N.Y. 2d 31, 39–40, 181 N.E. 2d 413, 416–417, citations omitted):

> Under New York law no funds are deemed surplus until the expenses of the sale, the costs of

> the action and the amount of the foreclosed mortgage debt plus interest have been fully paid. The procedure in this State requires the officer conducting the foreclosure sale to pay out of the proceeds all taxes, assessments and water rates which are liens on the property, unless the judgment directs otherwise. These payments are expenses of the sale by statute. * * *

In its brief in this Court the mortgagee argued that it was merely seeking "the unpaid balance of the original principal sum of its mortgage" (Brief of *Buffalo Savings Bank*, No. 96, this Term, p. 21).

This Court reversed on the authority of *United States* v. *New Britain*, 347 U.S. 81. *New Britain*, it stated, "quite clearly held that federal tax liens have priority over subsequently accruing liens for local real estate taxes, even though the burden of the local taxes in the event of a shortage would fall upon the mortgagee whose claim under state law is subordinate to local tax liens"; and it held that "the state may not avoid the priority rules of the federal tax lien by the formalistic device of characterizing subsequently accruing local liens as expenses of sale."

Thus, in *Buffalo Savings* the fact that granting the federal lien priority over local taxes would reduce the amount realized by the mortgagee on its secured claim did not justify giving the junior local liens priority over the federal lien. By similar reasoning, the priority of the federal tax lien over the attorney's fee cannot be defeated by the fact that, if such priority is recognized, the mortgagee will have to bear the legal expenses of realizing on its security.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed and the case remanded with a direction to award priority to the federal tax liens over the claim for an attorney's fee.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN B. JONES, JR.,
Acting Assistant Attorney General.

DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.

JOSEPH KOVNER,
GEORGE F. LYNCH,
Attorneys.

FEBRUARY 1963.

APPENDIX A

United States v. Pioneer American Ins. Co.

* * * * *

CARLETON HARRIS, Chief Justice (Dissenting Opinion). I cannot agree with the Majority opinion, for I am unable to distinguished the facts in the case at bar from those in *U.S. v. Bond*, 279 F. 2d 837 (C.A. 4th), and *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C.A. 2nd). I do not consider that discussion of those cases is necessary, for brief quotations from the opinions will suffice to explain my views. In *Bond*, the court said:

> For the same reasons, we must subordinate to priority of the federal tax liens the claim for an attorney fee paid by Perpetual in protection of the lien of its mortgage. The fee was incurred long after the attachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt secured thereby, the future existence or amount of such attorney fee, was, at best, speculative and uncertain.

In *New Haven*, that court said:

> The Bank sought an order in the District Court including an award of reasonable attorney's fees because the Clock Company, in the assignment contract, agreed "to reimburse the Bank for any and all legal and other expenses incurred in and about the checking, handling and collection of the accounts hereby assigned to the Bank and the preparation and enforcement of any agreement relating thereto." The Government, in its oral argument before this Court and in its brief, opposed this claim on the

> ground that the United States, acting pursuant to Sections 3670 and 3671 of the Internal Revenue Code of 1939, and Sections 6321 and 6322 of the Internal Revenue Code of 1954, 26 U.S.C. §§ 6321, 6322, had a tax lien on the proceeds of the assigned accounts which was prior to the "in choate" lien of the Bank. Since the amount of the Bank's lien for attorney's fees was unknown at the time of the Clock Company's petition for reorganization, this lien was "inchoate" in the sense used to determine its priority as against a United States tax lien. *United States v. City of New Britain*, 347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520. Thus, the Government's lien is superior to the claim for attorney's fees if the United States has complied with the aforementioned provisions of the Internal Revenue Codes and in addition has filed the notice of the lien as required * * *.

Here, there is no dispute that the lien was properly filed and recorded.

The Majority apparently depend in large measure upon the fact that our statute provides that a reasonable attorney's fee is enforceable as a contract of indemnity. In my view, this provision lends no weight to the position taken by the Majority. The sole question here is *when* the insurance company's lien for attorneys' fees came into existence, *i.e.*, did the attorneys' fee become choate before the Government filed its lien claim? There was a default on the note in October, 1960,[1] and the Majority state:

> * * * the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United States Government. So we are definitely of the opin-

[1] The first two federal tax liens were recorded in November, 1960, and January of 1961.

> ion that the right for attorney's fee became choate before the United States Government filed its lien claim.

The question, in my view, is not when the company became entitled to enforce the provision for an attorney's fee, but rather, when it actually did enforce it. I emphatically disagree with the statement of the Majority, for I cannot see that the company was due to add the attorney's fee *immediately upon default.* Debtors frequently are a few days late in making payments, but no one would contend that this permits a note holder to add an attorney's fee. The default in payments on this note occurred in October, but I daresay that if Rogers had subsequently made the October payment, and the other payments, no foreclosure suit would have been filed. Certainly, if delinquent payments had been made and accepted by the company, it would not be contended that Pioneer should be permitted to add an attorney's fee. In such event, there would have been no occasion to enforce any contract for indemnity, for there would have been no loss.

While the default occurred in October, 1960, *the foreclosure suit was not filed until March 24, 1961.* The claim for attorney's fee can only be enforced by court action, and though I am primarily of the opinion that an attorney's fee would not have priority over the Government's tax liens until it had been definitely fixed by the court, (prior to the recording of the liens) still, if that be error, then certainly I can see no possible priority for the attorney's fee until a suit is filed asking for the fee. Both the filing of the complaint, and the order fixing the fee, occurred after the recording of the federal tax liens. The note provides:

> The undersigned also agree(s) that in the event of default herein and of the placing of

> this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee.

Our statute, quoted by the Majority, also provides that the attorney's fee is enforceable "for services actually rendered." Therefore, under the language of both the note and the statute, *a default in payment is not sufficient to enable the note holder to add an attorney's fee;* services actually rendered by an attorney (generally the filing of a suit) are necessary. But, if it be said that an attorney could render service in trying to collect payments on the note before actually instituting any suit, I point out that this record is silent as to *when* this matter was placed in the hands of the attorneys for Pioneer. *There is no evidence that appellee's attorneys rendered any service relative to collection of the note prior to the filing of the foreclosure complaint.*

The Majority state that to allow the Government to recover the amount sought would "violate the rules against unjust enrichment." I personally find no merit in this contention. The Government has its attorneys, and I am quite sure, would have been only too glad to have brought its own proceeding for sale of the property to satisfy the tax liens if such action would have given it priority over appellee.

While I have commented to some extent relative to statements in the Majority opinion, this dissent is primarily based on the holdings in the *Bond* and *New Haven* cases, a reading of which persuades me that the lien for attorneys' fee did not become choate until a definite, fixed amount was allowed by the court. As previously stated, this, of course, was long after the recording of the federal tax liens.

I accordingly feel that the Government should prevail in its contention, and respectfully dissent.

APPENDIX B

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C., 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the

State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; * * *

* * * * * *

(26 U.S.C., 1958 ed., Sec. 6323.)

6A Arkansas Statutes, Annotated (1947 ed., 1957 Replacement):

68–101. *Requirements for negotiability.*—An instrument to be negotiable must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer;

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

68–102. *Sum certain—Definition.*—The sum payable is a sum certain within the meaning of the Act, although it is to be paid:

(1) With interest; or

(2) By stated instalments; or,

(3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or,

(4) With exchange, whether at a fixed rate or at the current rate; or,

(5) With costs of collection or any attorney's fee, in case payment shall not be made at maturity.

68–910. *Attorney's fee—Provision enforceable.*—A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent [10%] of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

UNITED STATES OF AMERICA, APPELLANT

vs.

PIONEER AMERICAN INSURANCE COMPANY, APPELLEE

Appeal from Sebastian Chancery Court, Fort Smith District

SUPERSEDEAS BOND

WHEREAS, the Appellant, United States of America, has taken an appeal from the Judgment of the Chancery Court of Sebastian County, Arkansas, Fort Smith Division, rendered on November 9, 1961, in favor of Appellee adjudging attorneys' fee in the sum of $1250.00 prior to the lien of the Appellant upon the property sold pursuant to said Judgment, and

WHEREAS, costs heretofore assessed in the Trial Court and other prior liens have been paid from the proceeds of said sale, and there now remains in the custody and control of the Trial Court the sum of $3,822.38, of which the sum of $2,572.38 pursuant to said Judgment of November 9, 1961, are funds of said Appellant, United States of America, and

WHEREAS, the Appellant, United States of America, now desires to supersede said judgment,

NOW THE UNITED STATES OF AMERICA and NATIONAL SURETY CORPORATION as surety hereby covenant with the Appellee that said Appellant will pay to Appellee

all costs and damages that may be adjudged against Appellant on appeal, or in the event of the failure of the Appellant to prosecute said appeal to final judgment in the Supreme Court, or if said appeal for any cause shall be dismissed that said surety shall pay to the Appellee all costs and damages and shall perform the Judgment of the Court appealed from; also that said appeal shall be perfected without delay; also, that he will satisfy and perform any Judgment or Order which the Supreme Court may render or order to be rendered by an inferior Court not exceeding $1250.00, costs of appeal, interest and damages for delay.

WITNESS our hands this 31st day of January, 1962.

UNITED STATES OF AMERICA.
CHARLES M. CONWAY,
United States Attorney.
By [S] Robert E. Johnson,
ROBERT E. JOHNSON,
Assistant U.S. Attorney.
NATIONAL SURETY CORPORATION.
By CARNALL WHEELER.

[SEAL]

Approved:
[S] Hugh M. Bland,
HUGH M. BLAND,
Chancellor.

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U.S. GOVERNMENT PRINTING OFFICE 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 405

UNITED STATES, *Petitioner*

v.

PIONEER AMERICAN INSURANCE COMPANY, ET AL.,
Respondent

BRIEF OF THE MORTGAGE BANKERS ASSOCIATION OF AMERICA AND THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, AMICI CURIAE, IN SUPPORT OF RESPONDENT

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Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

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JURISDICTIONAL STATEMENT

This brief is filed, pursuant to Rule 42, with the written consent of Petitioner and Respondent. Such written consents are submitted herewith.

INTEREST OF AMICI CURIAE

The nature of the interest of the amici curiae is as follows:

The Mortgage Bankers Association of America and The National Association of Mutual Savings Banks are trade associations representing, respectively, the

mortgage bankers and the mutual savings banks of the United States.

The Mortgage Bankers Association of America is interested in the disposition of this case because it has among its members all types of institutional investors, including life insurance companies and savings banks. The Association's membership also includes mortgage companies throughout the United States which originate all types of mortgages in large volume and service them for the institutional investors they represent. If the decision below is reversed, a considerable unanticipated financial burden may be imposed upon mortgage companies which are charged under their servicing contracts with the responsibility of protecting the interest of their investors for a fixed amount that cannot be changed. Also, if the decision below is reversed, the opportunities for sales of mortgages by mortgage companies may be greatly reduced.

Mutual savings banks are large investors in mortgages of all types and particularly in home loans guaranteed by the Veterans Administration or insured by the Federal Housing Administration. Such loans have been made in reliance on the long established practice and rule that the holder of a prior recorded mortgage will be permitted to recover the costs of foreclosing the lien which it holds, in the event of default, and that among those recoverable costs will be the amount of attorneys fees incident to such foreclosure proceedings. If the decision below is reversed, many of the loans now held will become subject to a potential jeopardy not contemplated when the loans were made. In the event of substantial economic decline and the consequent increase in defaults, which would undoubtedly be accompanied by similar increase in the number and

volume of liens asserted by the United States, a lender could be forced by a reversal of the decision below to bear an unanticipated share of any deficiency and the not inconsiderable legal costs incident to the foreclosure of its prior recorded mortgage or deed of trust.

The attached brief sets forth arguments which will be relevant in determining whether a reversal of the decision below would tend to frustrate the long series of legislative acts and court decisions which, almost since time immemorial, have protected *all* the interests of the holder of a prior recorded mortgage on real estate. These arguments may not be available to or may not adequately be urged by respondent.

The Mortgage Bankers of America and The National Association of Mutual Savings Banks and their members are greatly interested in obtaining a holding by this Court as to the applicability of earlier decisions relating to federal tax liens to the generally recognized principal that costs of foreclosure, including attorneys' fees, will be recognized in settling accounts in connection with the default of a prior recorded mortgage on real estate so that savings banks and mortgage bankers may reappraise the extent of their prudent participation in the making, recording and ownership of first mortgages on real estate.

THE PERTINENT FACTS

The mortgage (in form a deed of trust) was recorded July 7, 1956, securing a debt subsequently assigned to Pioneer. It provided that the debt secured thereby should be increased, in case of default, by the costs, charges and attorneys fees involved in collection proceedings (R. 13), and that the proceeds of any sale of the property thereunder should be applied *first* to pay the costs and expenses of executing the trust, including such attorneys fees (R. 14).

The mortgagors defaulted in October 1960, and on March 24, 1961, the foreclosure proceedings were filed by Pioneer in the chancery Court of Sebastian County, Arkansas. The United States filed five tax liens against the property, all after the default occurred, the last three being filed after the foreclosure proceeding began. On November 11, 1961, the Chancery Court entered a decree of foreclosure which found the tax liens subordinate to the lien of Pioneer "for all the amounts it secures, including principal of the note and interest thereon; * * * and attorney's fees fixed by the Court" (R. 72-74). The decree also fixed the fee of a court-appointed Receiver (R. 70) and of a Commissioner (R. 45, 47, 51), which were taxed as costs.

The petitioner did not object to the priority given the fees paid the Receiver and the Commissioner, but asserted that the tax liens had priority over the attorney's fee. On appeal to the State Supreme Court, the decree was affirmed.

STATUTES INVOLVED

The provisions of Sections 6321, 6322 and 6323 of the Internal Revenue Code are set forth in the Appendix, *infra*, p. 14.

SUMMARY OF ARGUMENT

1. Section 6323(a) of the Internal Revenue Code makes the federal tax lien invalid as against any of the mortgagee's rights which were secured by the prior recorded mortgage, including all the costs of foreclosure, such as attorneys fees.

2. It would be inequitable to tax respondent and enrich petitioner by the amount of the cost of bringing into existence the fund on which petitioner had established a lien.

ARGUMENT

1. Section 6323(a) of the Internal Revenue Code Makes the Tax Liens Invalid as Against Any of Pioneer's Rights Secured by the Prior Recorded Mortgage

Section 6323(a) states unequivocally that the tax lien provided by sections 6321 and 6322 "shall not be valid as against any mortgagee" (except upon filing in the manner provided). Unless this is construed to mean that the tax lien may not be given priority over the *entire* obligation secured by the mortgage, it is meaningless and impossible of application.

This statutory provision was originally enacted as Public Law No. 451, of the 62nd Congress, approved March 4, 1913, taking the form of an amendment to Section 3186 of the Revised Statutes, and was later embodied in Section 3672 of the Internal Revenue Code of 1939, which became Section 6323(a) of the Internal Revenue Code of 1954. Its purpose was explained in

the report of the Judiciary Committee of the House of Representatives (House Rep. No. 1018, 62nd Cong., 2d sess.), as being to remove the inequity of the prior law, as construed by this Court in *United States* v. *Snyder*, 149 U.S. 210. It was there held that the federal tax lien was valid and binding against a bona fide purchaser or encumbrancer in good faith for value without knowledge or notice of such a lien. The report of the Judiciary Committee concluded by saying:

> "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."

Provisions in mortgages which extend the mortgage lien to the expense of enforcement of the mortgagee's rights are and for many years have been commonplace. There is nothing in the statute or its legislative history to indicate that Congress intended that the preference given mortgagees over tax liens would differ in kind and quality from the preference mortgagees have historically enjoyed against other lienors. On the contrary, the Committee report cited made clear that the Government, in this respect, should be placed on the same level as an individual.

Certainly, after this mortgage was recorded, there was notice to all the world, including the Government, that Pioneer's secured lien was not only for unpaid principal and interest on the debt but also for all expenses of foreclosure in the event of default, specifically including attorney's fees. Petitioner here takes the anomalous position that, while the tax claim does not have priority over other costs of foreclosure (such as fees paid to a Receiver and to a Commissioner appointed by the Court) it does have priority over the

fee allowed the attorneys for conducting the foreclosure proceedings.

None of the decisions of this Court on which petitioner relies supports this position, since none of them involved liens of the type covered by section 6323(a). In *United States* v. *New Britain*, 347 U.S. 81, upon which petitioner chiefly relies, the question was one of priority as between Federal and local taxes, and this Court said (p. 88):

> "There is nothing in the language of section 3672* to show that Congress intended antecedent federal tax liens to rank behind *any but the specific categories of interests set out therein*, and the legislative history lends support to this impression." (*Emphasis supplied*)

The *New Britain* opinion cited Mr. Justice Jackson's concurring opinion in *United States* v. *Security Trust & Savings Bank of San Diego*, 340 U.S. 47, where it was held that the asserted lien was not, as claimed, that of a "judgment creditor" under section 3672. Mr. Justice Jackson, after reviewing the legislative history, said (p. 53):

> "My conclusion from this history is that the statute excludes from the provisions of this secret lien those types of interests which it specifically included in the statute and no others."

In short, both the *New Britain* case and the *Security Trust & Savings* case recognized that federal tax liens do rank behind the specific categories of interests set out in section 6323(a), and sustained the tax liens in those cases because the contesting liens were not of the character listed in 6323(a).

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* Now section 6323(a) of the 1954 Code.

Petitioner's construction of section 6323(a) would limit its application to *some* of the rights secured by the mortgage (principal, interest and *some* costs of collection), but not to others. Petitioner singles out the attorney's fees on the sole ground that the *amount* was not established when the federal tax liens "arose".* However, the same thing can be said as to the other foreclosure costs and, indeed, to mortgage interest thereafter accruing, all of which petitioner concedes have priority.

This argument, we submit, distorts the statutory language, by reading words into it which are not there, and ignores the legislative history.

The only decision by this Court involving the status of a mortgage lien which also secured attorney's fees is *Security Mortgage Company* v. *Powers*, 278 U.S. 149, where it was said (p. 155):

> "But the mortgage company does not seek to prove the claim in bankruptcy. It asks to have it allowed *as a part of the principal debt*, which is secured by a lien upon the property sold. * * * *The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given.* Property subject to a lien to secure a liability still contingent at the time of bankruptcy is not discharged from the lien by the adjudication. The *secured obligation* survives; * * *. When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication." (*Emphasis supplied*)

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* The test under section 6323(a) is not when the liens arose, but when notice was filed.

In *United States* v. *Sampsell* (CA 9), 153 F. 2d 731 (1946), tax liens were subordinated to the payment of attorney's fees under a similar provision of a mortgage, on the ground that "attorney's fees are a part of the secured debt and are entitled to be collected as such."

The same result was reached by the Fourth Circuit in *United States* v. *Seaboard Citizens Nat. Bank*, 206 F. 2d 62 (1953), where the United States sought forfeiture of an automobile it had seized for a violation of the internal revenue laws. The holder of a mortgage on the automobile intervened in the action asking remission of the forfeiture to the extent of its mortgage interest under 18 U.S.C. 3617. The mortgage, and the note secured thereby, provided for payment of an attorney's fee, which was ordered paid to the mortgagee from proceeds of the sale. The United States conceded the validity of the lien as to all except the attorney's fee which the Court had allowed. In rejecting the Government's claim, the Court said (p. 63):

> "Upon the seizure of the automobile by the officers, it was necessary for the bank" (the mortgagee) "to employ counsel to collect its note which was in default. The fees which they earned *were a part of the debt evidenced by the note and secured by the mortgage and there is no reason why they should be treated other than as a part of the debt so secured.*" (*Emphasis supplied*)

and at p. 64:

> "The argument that the government will be burdened by allowing such fees to be included in the lien as to which remission is granted is without foundation. *The government does not pay the fees. They are paid out of the proceeds of the property condemned.* There is no obligation rest-

ing on the government to provide for the remission of any part of the lien on the condemned property; but, if such remission is authorized, as it is, on the theory that an innocent lienholder should not suffer from the forfeiture, *there is no reason why he should suffer the loss represented by attorney's fees where these are expressly covered by his lien.*" (*Emphasis supplied*)

In the following cases, the Court allowed the mortgagee, without comment or objection by the United States, a preference for attorney's fees incurred subsequent to the filing of the federal tax lien:

Smith v. *United States* (U.S.D.C. Hawaii), 113 F. Supp. 702 (1953)
Ormsbee v. *United States* (U.S.D.C. Fla.), 23 F. 2d 926 (1928)

In *Streeter Bros.* v. *Overfelt* (U.S.D.C. Mont.) 202 F. Supp. 143, (1962), from which the Government did not appeal, the facts were on all fours with the facts in the present case. The mortgage provided for payment of costs and attorney's fees. The Government's notices of tax lien were filed after the mortgage was recorded but prior to the foreclosure. The Court nevertheless held that the lien for attorney's fees was prior to the Government's tax lien, saying:

"Here the mortgage expressly provides for the payment of costs and attorney fees. The statutes of Montana also provide that in an action to foreclose a mortgage the court must allow, as a part of the costs, a reasonable attorney fee.

* * * * *

"*Costs and attorney fees*, like interest, *are a part of the mortgage debt itself and are also a necessary expense of enforcing the mortgage lien.* The

> Court of Appeals of the Ninth Circuit has recognized repeatedly the mortgagee's preference with respect to accruing interest. Particularly in view of the fact that the mortgage was in default when the federal tax liens attached, costs and attorney fees should be accorded the same status as interest, even though the exact amount of each may not be ascertained until decree of foreclosure is entered." (p. 146). (*Emphasis supplied*)

The only Federal Court decision which might be considered to the contrary appears to be *United States v. Bond* (CA 4) 279 F. 2d 837 (1960), decided by a divided court. However, it does not appear from the facts in that case that the mortgage contained an explicit provision for attorney's fees on foreclosure. It is also to be noted that that case involved an action by the United States to foreclose its tax liens. Also, in the *Bond* case, the District Court filed a memorandum opinion (not reported) from which it appears that the Government conceded that the mortgage entitled the mortgagee to reimbursement for counsel fees; but denied the validity of its claim on the ground that "counsel was not needed except to put the mortgage before the Court." See Point 2, *infra*.

2. The Petitioner Would be Unjustly Enriched by a Reversal

The property here was subject to several competing liens. Any of the lienholders, including the United States, could have brought enforcement proceedings. If, for example, the first mortgagee had not taken any action, the Government to protect its lien might have found it necessary to reduce its claim to judgment. In order to obtain judgment it would have been necessary for the Government to have instituted foreclosure proceedings. To do this the Government would have had

to use its own attorneys. It would thus have had to assume the costs of such attorneys one way or the other, either in terms of paying the salaries of its own lawyers or of paying a fee to special counsel hired for the purpose. If this course had been pursued, the Government would have been compelled to recognize the right of the first mortgagee to the entire amount of the outstanding principal and interest on the mortgage *without any reductions of any sort*. But the effect of the Government's position in the *Pioneer* case is that, since it was the *mortgagee* which initiated legal action, the Government should not have to bear any part of the legal costs incident to such action even though it is this action which in a very real sense "produced" the funds from which the Government will be paid.

Having failed to take action to enforce its lien, and thus having forced the mortgagee to take action, the Government ought not to be in any better position than it would have been if it had sought to protect itself by initiating foreclosure proceedings through its own counsel and at its own expense. Thus, whatever it has cost the mortgagee to produce the funds which will not only pay off the the outstanding principal and interest but will be used to pay the Government's claim in part, such costs ought to be deducted from the proceeds before the Government is allowed to assert its rights against other claimants. Any other decision would give the Government a "super priority" and unduly penalize the mortgagee for having taken action from which the Government received a benefit.

The argument in the Government's brief that the services of the mortgagee's attorneys did not "create a fund in the sense that attorneys do when they successfully prosecute and recover claims for damages . . ." (p. 18)

does not seem to be pertinent. Whether or not the mortgagee's attorney's efforts "created a fund", they were a necessary condition to securing possession of the fund from which the Government will benefit.

As the Court said in *United States* v. *Bond*, *supra*, in distinguishing its own decision in *United States* v. *Seaboard Citizens National Bank*, *supra*, (p. 847):

> "In the *Seaboard* case, any amount received by the United States from sale of seized property was unanticipated revenue, a windfall, not to be credited as a payment on a fixed indebtedness."

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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I, H. Cecil Kilpatrick, of counsel for *amici curiae* hereinbefore named, hereby certify that a copy of the foregoing brief was served on the Solicitor General, Department of Justice, Washington 25, D. C., by delivery by his office on March 7, 1963, and that a copy was served on counsel for respondent, Owen C. Pearce, Esq., 107 Professional Life Building, Fort Smith, Arkansas, by depositing the same in the United States mail with air mail postage prepaid on the same date.

H. CECIL KILPATRICK

APPENDIX

Internal Revenue Code of 1954:

Sec. 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
(26 U.S.C., 1958 ed., Sec. 6321.)

Sec. 6322. Period of Lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.
(26 U.S.C., 1958 ed., Sec. 6322.)

Sec. 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; * * *

* * * * *

(26 U.S.C., 1958 ed., Sec. 6323.)

No. 405

IN THE

Supreme Court of the United States

October Term, 1962

UNITED STATES OF AMERICA, Petitioner

v.

PIONEER AMERICAN INSURANCE COMPANY
AND
THE DEVELOPMENT COMPANY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Brief of Pioneer American Insurance Company and The Development Company, Inc.

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OPINIONS BELOW

The decree of the Chancery Court of Sebastian County, Arkansas, (R. 35-48) is not reported. The opinion of the Supreme Court of Arkansas (R. 72-77) is reported at 235 Ark. 267, 357 SW2d 653. The dissenting opinion of Chief Justice Harris appears in Appendix A of Petitioner's Brief, pp. 23-26.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on June 4, 1962 (R. 77-78). The petition for a writ of certiorari was filed on September 4, 1962, and was granted on November 19, 1962 (R. 78; 371 US 909, 9 L.Ed.2d 169). The jurisdiction of this Court rests on 28 USCA 1257(3).

QUESTION PRESENTED

Whether federal tax liens will be accorded priority over an attorney's fee contracted between mortgagor and mortgagee and provided for in a note and securing mortgage, when the mortgage is placed of record prior to the tax liens.

STATUTES INVOLVED

Sections 6321, 6322 and 6323 (a)(1), Title 26 USCA; and Sections 51-1002, 68-101, 68-102, and 68-910 of Arkansas Statutes (1947) Annotated. These sections are set forth in Appendix A.

STATEMENT

The original note in the amount of $20,000.00, and the real estate mortgage (deed of trust) securing same bear the date of May 24, 1956 (R. 7, 9). The mortgage describes real property located in Sebastian County, Arkansas (R. 10), and was filed for record on June 7, 1956 (R. 17).

The note, which is payable in monthly installments, includes the following provision concerning attorney's fee:

"The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." (R. 7.)

The mortgage includes the following provisions: "That if either the party of the second part (trustee) or the party of the first part (mortgagor) shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this instrument, and the note secured hereby shall, at the option of the holder, become due and collectible." (R. 13.)

"The proceeds of any sale under this deed of trust shall be applied by the party of the second part as follows:

> "First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, . . .
>
> "Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing to the party of the third part (mortgagee) or the party of the first part, pursuant to this instrument.
>
> "And last, to pay the balance, if any, to the

party of the first part . . ." (R. 14.) (Parenthetical explanations supplied.)

The taxpayers, Ocie A. Rogers and Florene W. Rogers, husband and wife, acquired the real property by a deed which was placed of record on March 18, 1958. Under the provisions of such deed, taxpayers, Rogers, took the property subject to the mortgage, and they assumed the obligations of the note and mortgage. (R. 38). Thereby they assumed the status of mortgagors under such mortgage.

By assignment, Respondent, Pioneer American Insurance Company acquired the status of mortgagee under such mortgage. (R. 18.)

Under date of March 4, 1958, taxpayers, Rogers, made a note and second mortgage in favor of Respondent, The Development Company, Inc. The second mortgage was placed of record on March 18, 1958. (R. 27-29.)

Taxpayers, Rogers, defaulted under the note and first mortgage in failing to make payments which fell due in October, 1960, and thereafter. (R. 60.) The United States filed Federal Tax Liens at various times between the dates of November 29, 1960, and October 3, 1961 (R. 64). On March 24, 1961, Pioneer American filed a suit to foreclose its mortgage, praying among other things for a reasonable attorney's fee as provided in its note. (R. 1-6.) Various interested parties filed pleadings in the suit to assert their claims, including The Development Company, Inc. (R. 22-29) and the

United States (R. 20, 34). The United States admitted that its liens for taxes were subordinate to the lien of the mortgagee as to principal and interest, but claimed its liens were superior to the lien of the mortgagee as to an attorney's fee. (R. 20-21.)

On November 15, 1961, the Chancery Court of Sebastian County, Arkansas, entered a decree of foreclosure (R. 35-48) which fixed an attorney's fee of $1,250.00. (R. 43, 45.) The decree included a finding that the mortgage lien of Pioneer American Insurance Company was a first lien, and prior to the lien of the United States, as to all amounts secured by such lien, including principal of the note and interest thereon, and attorney's fees. (R. 42.)

In accordance with the foreclosure decree, the mortgaged property was sold, and it brought a price sufficient, to pay, in accordance with the decree of the Chancery Court, the judgment in favor of Pioneer American Insurance Company, the judgment in favor of The Development Company, Inc., a judgment in favor of Alfred J. Anderson (who is not a party here), and a part of the Federal Tax Liens. Had the United States been accorded priority of its tax liens over the attorney's fee, the effect of such holding would have been to afford $1,250.00 additional to the United States to apply on the tax liens, and to deny such amount to Alfred J. Anderson and The Development Company, Inc., the third and second lienors respectively. (R. 49-55.) Distribution of available funds has been made, except for an amount requested by the United States to be retained in the Registry of the Court. (R. 52-55.)

The United States appealed to the Supreme Court of Arkansas, which affirmed the decree of the Chancery Court, Chief Justice Harris dissenting. (R. 72-78.)

SUMMARY OF ARGUMENT

The Government stakes its entire case on the "choateness" principle enunciated in the case of United States v. New Britain (1958) 347 US 81, 98 L.Ed. 520, 74 S.Ct. 367. If the choateness principle does not apply to this case, or, if under applicable authority Pioneer American Insurance Company's mortgage lien is choate as to the attorney's fee, the Government cannot prevail.

The mortgage lien in this case, which secured the attorney's fee among other things, was created by contract between the taxpayers and the mortgagee. The contract (mortgage) was placed of record long prior to the time any Federal Tax liens were filed.

This Court has not applied the "choateness" principle to mortgage liens or other liens protected by 26 USCA 6323(a). Prior cases before this Court have involved local taxes, landlord's liens, attachment, garnishment, or material or labor liens, where the lienor was attempting to impose a lien upon taxpayer's property; or, unrecorded assignments held under the particular facts to secure perfected or unperfected claims. The case of United States v. Buffalo Savings Bank, No. 96, this Term, decided January 27, 1963, was deemed by this Court to involve priority between local tax liens and the Federal Tax Lien, and not, as here, priority as between the Federal Tax Lien and a mortgage lien created by contract and properly placed of record.

The choateness principle should not be applied in this case. Other litigants who have been before this Court would have to qualify as judgment creditors in order to obtain the protection of 26 USCA 6323(a). Even the Buffalo Savings Bank case was treated as a contest between a local government and the United States, and not as a mortgagee situation. This case, however, does involve a true mortgagee situation. Pioneer American Life Insurance Company should have reasonable freedom to contract as a mortgagee for obligations on the part of the mortgagor designed to protect the mortgagee's security, whether or not the mortgagor's obligations are susceptible to being defined as "choate" or "inchoate." Under Arkansas law the **entire mortgage** is a lien on the mortgaged property, and it is not required that the mortgage set forth the amount of the debt nor how it is evidenced. Furthermore, Arkansas law authorizes a provision for an attorney's fee such as here involved.

In the event the Court does apply the choateness principle to this case, the mortgage lien and the part thereof representing an attorney's fee is choate under Arkansas law and under the case of Security Mortgage Company v. Powers (1928) 278 US 149, 73 L.Ed. 236, 49 S.Ct. 84. Attorneys' fees are as choate as principal, interest, court costs, the commissioner's fee or the receiver's fee. The Government concedes principal and interest are prior. It raised no objections that court costs, a commissioner's fee and a receiver's fee were allowed by the trial court as items prior to the tax lien.

There should be employed in this case a standard

which has been sanctioned by this Court in recent cases, namely whether taxpayers have any interest under state law to which the Federal Tax Lien can attach. United States v. Bess (1958) 357 US 51, 2 L.Ed.2d 1135, 78 S.Ct. 1054; Aquilino v. United States (1960) 363 US 509, 4 L.Ed.2d 1365, 80 S.Ct. 1277; United States v. Durham Lumber Company (1960) 363 US 522, 4 L.Ed. 2d 1371, 80 S.Ct. 1282. Taxpayers, Rogers, having defaulted under the mortgage, can realize from the mortgaged real property only what is left after the foreclosure sale and payment of amounts secured by the mortgage, including the attorney's fee.

The legislative history of 26 USCA 6323 shows this Section was enacted in order to facilitate business transactions, and to put the Government in the same position as the individual with reference to liens on property. Neither of these purposes will be realized if the priorities contended for by the Government are given effect.

The substance of the relief requested by the Government is to take $1250 away from respondents who are prior lienors, and apply such amount in payment of taxes for which respondents have no liability, owed by taxpayers over whom respondents have no control. In equity and good conscience this should not be done, and if it is done the Government will be unjustly enriched.

ARGUMENT

I. THE "CHOATENESS" PRINCIPLE HAS NOT BEEN APPLIED BY THIS COURT TO MORTGAGEES, NOR TO THE OTHER PROTECTED CATEGORIES NAMED IN 26 USCA 6323(a).

The keystone of the Petitioner's case appears on Page 9 of its Brief, where it is stated that the Federal tax lien cannot be defeated by a prior state-created lien unless the latter is choate. Petitioner's argument assumes this is true as to **any** state-created lien, but its citations in Footnote 5 on Page 9 of its Brief do not support this assumption.

26 USCA 6323(a) says the Federal tax lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor, until proper recordation of the Federal tax lien. By the enactment of this provision, two classes of local liens were set up: (1) those protected under the provisions of 26 USCA 6323 (a); and (2) other local liens, not so protected. Among the latter class will be found numerous local liens which have not been reduced to judgment, such as local tax liens, attachment and garnishment liens, material and labor liens, and landlord's liens.

Since the Government stakes its case on the decisions cited in Footnote 5, Page 9 of its Brief, it becomes important to inquire as to what type of local lien is involved in each of the cited cases. Where a case involves a lien in one of the protected categories under 26 USCA 6323(a), the important inquiry is, was the "choateness" principle applied?

In the earlier cases, involving priority of debts owed to the United States by an insolvent debtor, the choateness principle was applied to local taxes and to a landlord's lien.[1] Later, when the question was priority as between the Federal tax lien and a local lien, most of the local liens in cases coming before this Court were claimed in connection with attachment, garnishment, the furnishing of labor or material, or the lienor's status as a landlord.[2] The case of United States v. Ball Construction Company (1957) 355 US 587, 2 L.Ed.2d 510, 78 S.Ct. 442, reversing 239 F2d 384, and Crest Finance Company v. United States (1961) 368 US 347, 7 L.Ed. 2d 342, 82 SCT 384, involved unrecorded assignments.

The only cases cited by Petitioner in its Footnote 5 where recorded mortgages were a significant part of the facts were the cases of United States v. New Britain

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[1]Spokane County v. United States (1928) 279 US 80, 73 L.Ed. 621, 49 SCt 321; New York v. Maclay (1932) 288 US 290, 77 L.Ed. 754, 53 SCt 323; United States v. Waddill (1944) 323 US 353, 89 L.Ed. 294, 65 SCt 304; Illinois v. Campbell (1946) 329 US 362, 91 L.Ed. 348, 67 SCt 340.

[2]United States v. Security Trust & Savings Bank (1950) 340 US 47, 95 L.Ed. 53, 71 SCt 111; United States v. Acri (1954) 348 US 211, 99 L.Ed. 264, 75 SCt 239; United States v. Liverpool & London Insurance Co. (1954) 348 US 215, 99 L.Ed. 268, 75 SCt 247; United States v. Scovill (1954) 348 US 218, 99 L.Ed. 271, 75 SCt 244; United States v. Colotta (1955) 350 US 808, 100 L.Ed. 725, 76 SCt 82, reversing per curiam 224 Miss 33, 79 S2d 474; United States v. White Bear Brewing Co. (1956) 350 US 1010, 100 L.Ed. 871, 76 SCt 646; United States v. Vorreiter (1957) 355 US 15, 2 L.Ed.2d 23, 78 SCt 19, reversing per curiam 134 Colo 543 307 P2d 475; United States v. Hulley (1958) 358 US 66, 3 L.Ed.2d 106, 79 SCt 117, reversing per curiam 102 S2d 599 (Fla.)

(1958) 347 US 81, 98 L.Ed. 520, 74 SCt 367; and United States v. Buffalo Savings Bank, No. 96, this Term, decided January 7, 1963, 9 L.Ed.2d 283.[3]

Petitioner in its Brief takes the position that under the New Britain case, a mortgage lien which is prior in time must be choate at the time the Federal tax lien is filed in order to have priority over the Federal tax lien. The New Britain case does not support the Government's contention. That case was a direct contest between a local government and the United States, involving priority of their respective liens. The mortgagee was not a party and therefore was making no claim

[3]Most of the cases decided by courts other than this Court, cited on Page 12 of the Government's Brief as holding that the Federal tax lien has priority over a lien for attorney's fee, are distinguishable from this case. In United States v. Bond (CA4 1960), 279 F2d 837, certiorari denied (1960) 364 US 895, 5 L.Ed.2d 189, 81 SCt 220, which was a suit brought by the United States to foreclose its tax lien, there was no provision in the note or mortgage for the attorney's fee as here. In re New Haven Clock & Watch Company (CA2 1958), 253 F2d 577, was a proceeding for reorganization under the Bankruptcy Act. The record on appeal was incomplete concerning the attorney's fee and the case was remanded to the lower court, therefore the opinion was dictum so far as it dealt with the attorney's fee. United States v. Ringler (ND Ohio 1958), 166 FSupp 544 involved legal services not incident to foreclosure, but separately rendered by the mortgagee to the mortgagor. First State Bank of Medford v. United States (DC Minn 1958), 166 FSupp 204 involved an unrecorded assignment and a claim for an attorney's fee by an attorney who rendered services for the mortgagor, and not fees incident to foreclosure. In American Surety Company of New York v. Sundberg (SC Wash 1961), 58 Wash2d 337, 363 P2d 99, certiorari denied 368 US 989, 7 L.Ed.2d 526, 82 SCt 598, there was no provision in the mortgage for an attorney's fee.

before this Court in connection with its rights under the note and mortgage.

The Government argued in the New Britain case that, except as Congress has provided otherwise, the Federal tax lien was paramount to State-created liens; and that the only exceptions Congress had seen fit to allow are those specifically set out in 26 USCA 6323(a) (Section 3672 of the Internal Revenue Code of 1939), which protects mortgagees, pledgees, purchasers and judgment creditors. The Court agreed with this argument:

> "There is nothing in the language of Section 3672 to show that Congress intended antecedent Federal tax liens to rank behind **any but the specific categories of interests set out therein,** and the legislative history lends support to this impression." United States v. New Britain (1958) 347 US 81, 98 L.Ed. 520, 527, 74 SCt 367. (Emphasis supplied.)

As authority for this statement, the Court cited Mr. Justice Jackson's concurring opinion in the Security Trust & Savings Bank case, where it was held that the state lien was not that of a "judgment creditor" within the meaning of Section 6323(a). In other words, the New Britain case (and also the Security Trust & Savings Bank case) recognized the two classes of local liens, holding that the local lien would either have to be choate, or else within the provisions of Section 6323(a), in order to be prior to the Federal lien.

Like the New Britain case, the Buffalo Savings

Bank case involved a recorded mortgage as a significant part of the facts. Unlike the New Britain case, the mortgagee was a party in the Buffalo Savings Bank case. However, such mortgagee's rights were not protected by contract as in the case at bar. In event of default under the Buffalo Savings Bank mortgage, the mortgagee was "empowered to sell the mortgaged premises according to law." Brief of Buffalo Savings Bank in United States v. Buffalo Savings Bank, Page 6. Under statutes of the State of New York and the trial Court's decree, the referee who was appointed to sell the foreclosed property had authority to pay out of the proceeds of the sale local sales taxes which were liens upon the property sold, and to charge such payments as expenses of the sale. This Court treated the priority question in the same manner as in the New Britain case, namely as a direct contest between local taxing authorities and the United States, adding that "**the state** may not avoid the priority rules of the Federal tax lien by the formalistic device of characterizing subsequently accruing local liens as expenses of sale." (Emphasis supplied.) United State v. Buffalo Savings Bank, No. 96, this Term, decided January 7, 1963, 9 L.Ed.2d 283.

The case at bar is different from the cases cited by Petitioner in its Footnote 5, and from other cases decided by this Court involving priority of the Federal tax lien, in that the mortgagee's rights have been specified by contract with the taxpayer, and notice of such contract was made a matter of record long prior to the filing for record of the tax lien of the United States. In the note between the original mortgagor and mort-

gagee, the mortgagor agreed "that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." (R. 7.) In the recorded mortgage it was provided that in event of litigation involving the interest of the mortgagor or the trustee, ". . . . attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this instrument . . ." (R. 13.) (In the Record as originally printed, the word "by" erroneously appears as "to.") Also, it is specifically agreed under the mortgage (deed of trust) that in event of a foreclosure sale, the proceeds of the sale " . . . shall be applied by the party of the second part . . . to pay . . . attorney's fees . . . with interest thereon." (R. 14.) The mortgage which, together with the note it secured, constituted the contract between the mortgagor and mortgagee, was placed of record on June 7, 1956 (R. 17). The taxpayers, Ocie A. Rogers and Florene W. Rogers, assumed the obligations of the mortgagor and became bound on the mortgage of record on March 4, 1958 (R. 60). The first tax lien was filed on November 20, 1960 (R. 64).

Except for the two unrecorded assignment cases and the Bufaflo Savings Bank case, the cases cited by Petitioner in its Footnote 5 involved adverse situations between the lienor and the taxpayer. The lienor in those cases was trying to impose or enforce the lien, as contrasted with this case, where the mortgage lien was contracted by the taxpayers.

In one of the unrecorded assignment cases, United States v. Ball Construction Company, this Court held in a 5 to 4 decision that under the facts of that case the claim of the assignee was unperfected and therefore must yield to the Federal tax lien. In the other unrecorded assignment case, however, namely Crest Finance Company v. United States, the claim of the assignee was conceded by the Solicitor General to be choate, and the decision was for the taxpayer.

The difference between this case and the Buffalo Savings Bank case is that there is here involved a contract right in favor of the mortgagee, rather than a local tax lien as in the Buffalo Savings Bank case; and in this case there are mandatory provisions in the contract requiring the mortgagor to pay the mortgagee's attorney fee in event of foreclosure, whereas the contract as well as the applicable state law were in permissive terms in the Buffalo Savings Bank case.

II. THE "CHOATENESS" PRINCIPLE SHOULD NOT BE EXTENDED TO LIENS OF MORTGAGEES AND TO THE OTHER PROTECTED CATEGORIES NAMED IN 26 USCA 6323(a).

Prior to the case at bar, this Court has not considered the question of priority as between the Federal tax lien and an attorney's fee which is clearly a component part of the mortgage lien.

In the cases cited by Petitioner in its Footnote 5, local lienors would have been entitled to the protection of 26 USCA 6323(a), if at all, as judgment creditors.

The court held that these lienors had not completed proceedings sufficient to establish their liens within the protected category of judgment creditors. Under the facts of the Buffalo Savings Bank case, the court treated it as a contest between a local government and the United States.

This case in the first case where a true mortgagee situation is before the Court in the sense that the claim for priority is a matter of contract between the mortgagor and the mortgagee, and cannot be classified as a claim of a local government for taxes, of one who sues out an attachment, or any of the other classes of local lien claimants in the cases cited in Footnote 5 of Petitioner's Brief.

Respondent Pioneer American Insurance Company, as well as all other mortgagees in the same situation, should have reasonable freedom to contract as a mortgagee for obligations on the part of the mortgagor designed to protect the mortgagee's security, whether or not the mortgagor's obligations are susceptible to being defined as "choate" or "inchoate." If the choateness test is applied to the contract obligations between the mortgagor and the mortgagee, and if this Court finds that the obligations of the mortgagor do not meet the choateness test, Respondent Pioneer American and all other mortgagees will be placed in a situation such that it will be impossible for them to contract voluntarily with a mortgagor in a manner that will adequately protect them against loss in event of foreclosure.

In Arkansas, the statute which gives effect to the

mortgage lien defines the lien in terms of the mortgage itself, and not in terms of principal, interest, or other component parts of the mortgage.

> "51-1002. Lien Attaches When Recorded.—Every mortgage of real estate shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." Arkansas Statutes (1947) Annotated, 51-1002.
>
> (This Section was amended by the Uniform Commercial Code, Act No. 185 of the Acts of Arkansas, 1961, Section 10-102, to the extent of deleting personal property from the Section as previously written.)

By decision it is the rule in Arkansas that even if the mortgage does not set forth the amount of the debt and the manner in which such debt is evidenced, the mortgage security is not necessarily invalidated.

> "If the mortgage contains a general description, sufficient to embrace the liability intended to be secured and to put a person examining the records upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand." Curtis & Lane v. Flinn, Trustee (1885) 46 Ark. 70, 72.

See also Bank of Dyer v. Cole (1923), 157 Ark. 583, 586, 249 SW 32.

Furthermore, attorney's fees such as involved in this case have been specifically approved by the General Assembly and the Supreme Court of Arkansas. Arkansas Statutes (1957) Annotated 68-910 (Act 350 of the Acts of Arkansas 1951) authorizes a provision in a note for payment of reasonable attorneys' fees, not to exceed 10% of the amount of principal due, plus accrued interest. This statute has been upheld, as to its constitutionality and otherwise, in a contested foreclosure case. Holloway v. Pocahontas Federal Savings & Loan Association (1959) 230 Ark. 310, 323 SW2d 204. The Arkansas Supreme Court observed that under this statute, the parties to a note are permitted to make a voluntary agreement for a reasonable attorney's fee for the creditor. 323 SW2d at 206.

In its brief the Government speaks of the portion of the lien representing attorneys' fees as if it were a seporate lien in this case, but it is not. It is a part of the mortgage lien, which is conceded to be prior as to the principal mortgage debt, interest thereon, and apparently, court costs. It would not be proper to speak of an "interest lien" or a "court costs lien," and it is not proper to refer to a "lien for attorneys' fee" where the attorney's fee is an incident of the mortgage the same as interest and court costs.

Despite the concessions the Government has made as to the choateness of interest and court costs, neither these items nor attorneys' fees are of a nature such that their amounts will be established (as the Government claims is necessary under the choateness concept) at the time the Federal tax lien arises. The mortgagee's rights

should not be subjected to a separate and unrealistic test as to one component part of his mortgage lien—he should recover what he has contracted for.

Because of the attributes of Respondent Pioneer American's status as a mortgagee, and especially the fact that its contract with taxpayers Rogers reflects a business transaction designed to afford reasonable protection to Pioneer American's mortgage security, such contract having been voluntarily entered into and placed of record long before the first United States tax lien was recorded, the choateness principle should not be applied to this case.

III. IN EVENT THE COURT DOES APPLY THE CHOATENESS PRINCIPLE TO THE CASE AT BAR, THE MORTGAGE LIEN FOR ATTORNEY'S FEES IS CHOATE UNDER ARKANSAS LAW AND DECISIONS OF THIS COURT.

On Page 10 of Petitioner's Brief, the New Britain case is quoted to the effect that in order for a state-created lien to be "choate" in the Federal sense, the identity of the lienor and the property subject to the lien must be known, and the amount of the lien must be established. There is no question in this case as to the identity of the lienor and the property subject to the lien. The only consideration important to choateness as defined in the cases cited by the Petitioner is whether the amount of the lien has been established in accordance with such cases.

The face amount of the mortgage lien was

$20,000.00 (R. 7), but at any given time, such as on November 29, 1960, when the first Federal tax lien was filed (R. 64), the principal debt might be an entirely different amount due to payments in the meantime, and such payments might cause the principal debt to be changed any number of times. In like manner, interest might change due to reduction of principal, accumulation of interest on unpaid installments, or additional interest provided by the terms of the note on delinquent payments. (R. 7.) Petitioner admitted at the trial that principal and interest of Pioneer American's debt were entitled to priority over the Federal tax lien (R. 66, 67), despite these uncertainties, which might cause the total amount of principal or interest due under the mortgage to be either greater or less that what was due at the time the Federal tax lien was filed.

Certain other items in connection with Pioneer American's mortgage lien appear also to have been conceded by the Petitioner to be prior to the Federal tax lien, although they arose after the tax liens were filed. These include court costs of $257.55 (R. 46, 51, 54), including a commissioner's fee for making the foreclosure sale in the amount of $35.00 (R. 50, 51, 53); and a fee for the receiver in the amount of $175.00 (R. 45).

The total amount of Pioneer American's judgment, including interest and attorney's fees, was $18,689.87 (R. 43, 45) which was less than the record amount of $20,000.00 for which Pioneer American had taken its mortgage (R. 7).

So far as the attorney's fee was concerned, it was

stated in the note to be for a reasonable amount (R. 7), but the amount was further limited by the provisions of Arkansas Statutes (1947) Annotated, 68-910 to ten per cent of the amount of the principal due, plus accrued interest. The maximum amount of the attorney's fee, being a percentage of principal and accrued interest, could be determined as easily as the principal and interest themselves, which are conceded to have priority. The amount of the attorney's fee was uncertain or inchoate only in the same sense as was the principal and interest, namely that events after the filing of the tax liens might cause the attorney's fee either to be more due to accumulations of interest, or less due to payment of principal or interest, or action by the court in setting the attorney's fee at less than the maximum statutory allowance.

The Supreme Court of Arkansas has specifically held that the rights to the attorney's fee became choate prior to the time the Federal tax lien was filed, due to the recording of the mortgage in 1956 setting out that an attorney's fee would be added in event of default, and the fact that there was a default prior to the filing of the Federal tax lien, making the provision for an attorney's fee enforceable under the Arkansas law as a contract of indemnity (R. 75, 76). The Arkansas Court has also relied upon Arkansas Statutes (1947) Annotated 68-102, which is a part of the Negotiable Instruments Law and which provides in part: "The sum payable is a sum certain . . . altrough it is to be paid: . . . (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity." (R. 74.)

The effect of the Arkansas Supreme Court's citation of Arkansas Statutes (1947) Annotated 68-102 is that the attorney's fee becomes a part of the principal debt, as further provided in the mortgage. (R. 13.) This is in accordance with the Arkansas decisions, which have construed liberally the scope of the mortgage lien. The entire mortgage is considered in ascertaining the intention of the parties as to whether the mortgage secures an indebtedness other than the note specifically described therein. Jones v. Dowell (1928) 176 Ark. 986, 989, 4 SW2d 949.

Petitioner maintains on Page 13 of its Brief that the case of Security Mortgage Company v. Powers (1928) 278 US 149, 73 L.Ed. 236, 49 SCt 84, does not indicate that the attorney's fees became choate prior to the perfection of the Federal tax liens in this case. It is said that this is so because, among other things, the Powers case did not involve the priority of a Federal tax lien.

The importance of the Power case is not in the fact of whether it did or did not involve a Federal tax lien, but in the fact that in order for this Court to arrive at a decision in the case it was necessary to consider the true nature of a provision in a mortgage for attorneys' fees.

The Court observed in the Powers case that under the applicable section of the Bankruptcy Act the trustee took the property of the bankrupt "subject to valid liens existing at the time of the institution of the bankruptcy proceedings." 278 US at 153. Certain real estate owned by the bankrupt was subject to a mortgage in favor of Security Mortgage Company. The

notes secured by the mortgage contained a provision for all costs of collection, including ten per cent as attorney's fees. The notes had not been defaulted prior to the adjudication of bankruptcy.

The trustee in bankruptcy procured an order to sell the mortgaged property free of liens, and at the sale Security Mortgage Company was the purchaser, for a price in excess of all liens. Security asked to be allowed as a credit against the purchase price the sum of $9,442.40 for attorney's fees. The argument of the trustee was that since there had been no default on the notes at the time of the bankruptcy adjudication, the liability for attorneys' fees was contingent and not proveable under the Bankruptcy Act. This Court, however, characterized the lien for attorney's fees as "not inchoate" and "perfect when the principal note and the loan deed securing it were given," 278 US at 156.

Petitioner contends that the attorney's fees in the case at bar should be denied priority because of being inchoate, yet in the Powers case, where the important facts concerning the provisions for the attorney's fee were substantially similar to the facts of the case at bar, this Court specifically found that the lien of the mortgage was not inchoate. The importance of the Powers case cannot be diminished by Petitioner's reference to the "long line of subsequent decisions in which this Court held that a state-created lien is not choate" (Page 14 of Petitioner's Brief), for the reason that such subsequent decisions, as aforesaid, have not dealt with mortgage liens comparable to the mortgage lien in the Powers case and in the case at bar.

Not infrequently in the field of tax law it becomes necessary to examine the true nature of property interests under non-tax law in order to ascertain how the tax law applies. So it is here, the Powers case holding that a provision in a mortgage for an attorney's fee makes the mortgage lien, so far as the attorney's fee is concerned, "not inchoate," but "perfect." Being perfect and specific, the priority of the attorney's fee over the Federal tax lien should be recognized, along with the other components of the mortgage debt including principal and interest.

IV. THERE SHOULD BE EMPLOYED IN THIS CASE A STANDARD WHICH HAS BEEN SANCTIONED BY THIS COURT IN RECENT CASES, NAMELY WHETHER TAXPAYERS HAVE ANY INTEREST UNDER STATE LAW TO WHICH THE FEDERAL TAX LIEN CAN ATTACH.

In 1958, there came before this Court the case of United States v. Bess (1958) 357 US 51, 2 L.Ed.2d 1135, 78 SCt 1054, in which the Federal tax liens had been perfected against the property of Mr. Bess prior to his death on June 29, 1950. After the assets of Mr. Bess' estate were applied to payment of the tax liens, a total of approximately $8,800.00 remained unpaid. Mr. Bess had carried insurance on his life in a total amount of approximately $63,500.00, and the cash surrender value of the policies at his death was about $3,300.00. During his life he had retained ownership rights in the policies, including the right to change the beneficiary, to bor-

row against the cash surrender value and to assign the policies. The Government contended that the entire proceeds of the life insurance policies should be available to pay the tax liens, but this Court, following New Jersey law, held that Mrs. Bess, the beneficiary of the policies, was liable as a transferee only to the extent of the cash surrender value of the policies. The place of state law in this situation was stated to be as follows:

> "Since Section 3670 (now 6321) creates no property rights, but merely attaches consequences, federally defined, to rights created under state law, ... we must look first to Mr. Bess' right in the policies as defined by state law.
>
> "... Once it has been determined that state law creates sufficient interest in the insured to satisfy the requirements of Section 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. ..." 2 L.Ed.2d 1134, 1141. (Parenthetical explanation supplied.)

In 1960 two cases came before this Court in both of which the Federal Government was claiming a sum of money under its tax lien, and sub-contractors were claiming the same money under provisions of local law. These cases were Aquilino v. United States (1960) 363 US 509, 4 L.Ed.2d 1365, 80 SCt 1277, and United States v. Durham Lumber Company (1960) 363 US 522, 4 L.Ed.2d 1371, 80 SCt 1282. In the Aquilino case which arose in the New York State Courts, the petitioning sub-contractors did their work in August and September of

1962, and in November of that year they filed notices of their mechanic's liens, and later sued to foreclose those liens. The Government filed its notice of Federal tax lien during October of 1962. Approximately $2,200.00 owed by the owner of the property under the general contract to the general contractor (taxpayer) was deposited in Court pending decision of the competing claims between subcontractors. The contention of the subcontractors was that since the general contractor (taxpayer) owed them more than the $2,200.00 for labor and materials supplied to the job under the New York Lien Law, the general contractor had no interest in the $2,200.00. This Court, reversing the New York Court of Appeals, remanded the case for a determination as to whether or not the taxpayer had an interest in the $2,200.00 fund. In its opinion, this Court said the important question was not only whether the general contractor had any property under local law, but also the extent of such property:

> "The threshold question in this case, as in all cases where the Federal government asserts its tax lien, is whether and to what extent the taxpayer has 'property' or 'rights to property' to which the tax lien could attach. In answering that question, both Federal and State Courts must look to state law, for it has long been the rule that 'in the application of a Federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.' . . . Thus, as we held only two Terms ago, Section 3670 'creates no property

rights but merely attaches consequences, federally defined, to rights created under state law...' (citing the Bess case)... However, once the tax lien has attached to the taxpayer's state-created interest, we enter the province of Federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayers' 'property' or 'rights to property' (citing cases, including many of those cited by Petitioner in Footnote 5 of its Brief)..." 4 L.Ed.2d 1365, 1368-1369. (Parenthetical explanations supplied.)

On remand, the New York Court of Appeals concluded:

"...as a matter of New York law, a contractor does not have a sufficient beneficial interest in the moneys, due or to become due from the owner under the contract, to give him a property right in them, **except insofar as there is a balance remaining after all subcontractors and other statutory beneficiaries have been paid.**" Aquilino v. United States (1961) 10 NY2d 271, 282, 219 NYS2d 254, 176 NE2d 826. (Emphasis supplied.)

In the Durham Lumber Company case, which arose in the Bankruptcy Court, the owners of the property owned under the construction contract the sum of $5,250.00 to the general contractor, who was also the taxpayer and the bankrupt. This $5,250.00 was paid to the trustee in bankruptcy, and it was claimed on the one hand by subcontractors who had not been paid by the

general contractor-taxpayer-bankrupt, and on the other by the Federal Government as a result of its tax liens. The taxes had been assessed in August and November of 1954. The subcontractors had completed their work during July of 1954, and had given the owners of the property notice of their claims in January and February of 1955. The taxpayer-general contractor was adjudicated bankrupt on January 18, 1955.

The Court of Appeals below had stated that the nature and extent of the general contractor's property rights, to which the tax lien attached, must be ascertained under state law, and it had found that under North Carolina law, the property right of the general contractor subject to seizure under the tax lien was the excess, if any there was, of the claim of the general contractor over the claims of the subcontractors. This Court stated that the Court of Appeals was correct in asserting that the Government's tax lien attached to the taxpayer's property interests in the fund as defined by North Carolina law. This Court accepted the interpretation of North Carolina law by the Court of Appeals which was deemed to be skilled in the law of that state and it was indicated by this Court that if the Courts of North Carolina had interpreted the local law which was involved in the case, such interpretation would have been accepted in reaching a decision as to the property rights of the taxpayer. 4 L.Ed.2d at 1374.

Mr. Justice Harlan and Mr. Justice Black dissented in both the Aquilino and Durham Lumber Company cases, stating among other things that they could not be distinguished from a line of cases dealing with priority

of Federal tax liens, most of which are cited in Footnote 5 of Petitioner's Brief. 4 L.Ed.2d at 1375 and 1376.

Do the taxpayers here, Ocie A. Rogers and Florene W. Rogers, have any property rights to which the Federal tax liens can attach? We submit that they do not, until provision is made for all prior mortgage liens including the attorney's fee as provided in the first mortgage. Their position is that of mortgagors (they are assignees of the original mortgagor). Their predecessors executed a conveyance (deed of trust) with covenants of warranty in favor of the mortgagee, Republic Mortgage Company, Inc., which assigned to Respondent, Pioneer American Insurance Company. The conveyance is on condition that the promissory note secured by the mortgage will be timely and fully paid, and that all other terms and provisions of the mortgage will be complied with, including payment of the attorney's fee provided for in the note and mortgage. In event of default under the mortgage followed by foreclosure and sale, proceeds of the sale are to be applied to the items secured by the mortgage, including the debt, interest thereon, and attorney's fees. (R. 14.) Only after all of this is done, or else the debt and interest have been paid without default, is it possible to define the extent of Mr. and Mrs. Rogers' property or rights to property in the real estate or its proceeds.

Under Arkansas law the legal title to lands included in a mortgage or deed of trust passes to the mortgagee or the trustee for the purpose of making the security available in payment of the debt. Foreman v. Holloway & Son (1916) 122 Ark 341, 344, 183 SW 763, Hughes,

Arkansas Mortgages (1930), p. 5, Secs. 4, 5. Here the debt includes the attorney's fee. The trustee under the deed of trust (R. 9), and not taxpayers Rogers, has legal title to the real estate for the purpose of making it available for payment of the entire mortgage debt, including the attorney's fee.

As in the Aquilino case, where on remand it was held by the New York Court of Appeals that a contractor did not have a property right in money due him by an owner, except after payment of subcontractors and other statutory beneficiaries; so here, taxpayers Rogers have no property right in moneys due from proceeds of a foreclosure sale, except after payment of the principal of the mortgage debt and the other items secured by the mortgage including interest and the attorney's fee.

The Government seems to concede that under Arkansas law and apart from the choateness concept, the attorney's fee is entitled to first priority as a part of Pioneer American's first mortgage (Page 5 of Petitioner's Brief). Under the terms of the mortgage and provisions of Arkansas law, taxpayers Rogers cannot relieve themselves of the obligation for the attorney's fees except by prompt payment of the obligation, or else after default by payment of same from the proceeds of the foreclosure sale. Since they have defaulted, it is clear under state law that the attorney's fee must be paid from the proceeds of the foreclosure sale so long as there are any funds left with which the fee may be paid —this would be true even if the Government liens were paid before the attorney's fee. Therefore the property

or property rights of taxpayers Rogers in the real estate or its proceeds can only be what is left after payment of the amounts secured by the mortgage, including the attorney's fee.

V. THE LEGISLATIVE INTENTION WILL BEST BE CARRIED OUT IF THE ATTORNEY'S FEE IS ACCORDED FIRST MORTGAGE PRIORITY.

26 USCA 6321 provides for the basic Federal tax lien, stating that when one neglects or refuses to pay a tax after demand, such tax, including interest, penalties and certain other additions, shall be a lien in favor of the United States upon all property and rights to property of the taxpayer.

A similar provision has been a part of our law since 1866. 14 Stat. at L. 98, 107, Chapter 184. The priority of a Federal tax lien under this basic provision was, from the first, governed by the doctrine of "first in time is first in right." Detroit Bank v. United States (1942) 317 US 329, 334, 87 L.Ed. 304, 63 SCt 297. Accordingly, a valid mortgage placed of record before demand was made for the tax (or before assessment, 26 USCA 6322), would be given priority over the Federal tax lien; but if the Federal tax lien arose first it was prior, even if it was not recorded.

What is now 26 USCA 6323 (Section 3672 of the Internal Revenue Code of 1939) was first enacted in 1913, providing that the Federal tax lien shall not be valid against any mortgagee, pledgee, purchaser or judg-

ment creditor until notice has been filed in the appropriate office designated by the law of the state or territory. The House Report accompanying the proposed amendment was H. R. Rep. No. 1018, 62nd Congress, 2nd Session. See concurring opinion of Mr. Justice Jackson, United States v. Security Trust & Savings Bank, 71 SCt. at 114. The Report read in part as follows:

> "The lien (under the law prior to the 1913 amendment) is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subject to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the Internal-Revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.
>
> "The recent Act relating to excise tax by corporations makes it imperative that some legislation of this kind be enacted in order to protect the transfer of property, and to facilitate business transactions. There is no reason why the government should not occupy the same position with reference to liens on property as does the individual.
>
> "It is believed that the states will very readily pass legislation authorizing the filing of notice in the

> office of the registrar or recorder of deeds, in order to protect its citizens in business transactions against liens which the citizens cannot know of except at great cost of money and time. This law simply gives the states the opportunity to do so if it wishes to save its citizens fro mthis unnecessary burden." House of Representatives Report No. 1018, 62nd Congress, Second Session, July 17, 1912. (Parenthetical explanation supplied.)

Such report reflects that two things were intended in connection with the new legislation. First, business transactions would be facilitated, and second, the Government would occupy the same position with reference to liens on property as does the individual.

If the Federal tax liens are given priority over the attorney's fee in this case, the effect will be to discourage the making of mortgage loans, contrary to the design of the Section to facilitate business transactions. This will be so because lenders will know from the start that in event of defaults on their loans followed by foreclosure, there is no way they can avoid taking a loss where a substantial Federal tax lien has been filed against the owner of the property. The case at bar is a perfect example of this situation. But for the tax lien Respondents Pioneer American Insurance Company and The Development Company, Inc., both being mortgagees of taxpayers Rogers, could avoid loss by Pioneer American bidding the amount of its out-of-pocket expenses including the attorney's fee, and The Development Company, Inc., bidding that amount plus its own out-of-pocket expense. Under the priorities contended

for by the Government, however, as explained in Footnote 3 on Pages 4 and 5 of Petitioner's Brief, there is no way for The Development Company, Inc., to avoid the loss of approximately one-half of its second mortgage loan. This is so even though the property sold at the foreclosure sale for an amount sufficient to pay the loans of both Respondents, with several thousand dollars left over.

If the Government prevails in its contentions in this case, it means that every company engaged in the business of lending money secured by real estate mortgages will have to take into account as a part of its planning that in any case where a Federal lien is filed against the owner-mortgagor, it will not be able to foreclose in event of default without taking a loss on the transaction to the extent of the fees it pays attorneys to handle the foreclosure.

This prospect of unavoidable loss to mortgagees will affect most real estate loans in the country, because the great majority of states allow recovery by the mortgagee of attorney's fees upon foreclosure. Among the fifty states and the District of Columbia, 45 jurisdictions appear to have statutes or decisions relating to allowance of attorney fees in foreclosure cases, and of these, 39 jurisdictions allow them in some form. Undoubtedly these 39 jurisdictions (not to mention the 6 jurisdictions where no authority was found one way or the other) represent the great majority of real estate mortgages now outstanding and which will be made in the future (Appendix B).

Another serious consequence of the Government's

contentions, if accepted by this Court, would be that a large amount of mortgage debt would be subjected to the possibility of unavoidable loss in event of foreclosure, in order to facilitate collection of a relatively small amount of Federal taxes. As of June 30, 1961, for example, the total amount of mortgage debt outstanding in the United States amounted to $215,200,000,000. Federal Reserve Bulletin, January, 1963, Page 61. On the same date, the amount of unpaid taxpayer accounts with the Internal Revenue Service was $1,023,263,000. The latter figure included accounts on which liens had not been recorded as well as those on which they had been recorded. Necessarily the money amount of accounts on which recorded liens were employed would be substantially less than the aforesaid amount of $1,023,263.000. Internal Revenue Service, United States Treasury Department, 1961 Annual Report for the Fiscal Year Ended June 30, 1961, Page 47.

The importance to the Government of the priority it claims is doubtful because in most foreclosure sales no surplus arises—the first mortgagee buys the property by applying his claim against the bid price. The matter is of great importance to mortgage lenders, however, because a cloud would be cast over practically every real estate mortgage in 39 states or more, in that the mortgagee in any given transaction may be forced into a loss position without any fault on his part and with no way to avoid the loss.

The Government's contentions call for a super priority in behalf of the tax lien, and not a lien for the Government similar to liens in favor of individuals, as

mentioned in House of Representatives Report No. 1018. In none of the proceedings in this case, from the time it was first filed up to the present, has either the Government or the other litigants in the case suggested any set of circumstances under which an individual litigant would have priority over the attorney's fee but not the remainder of the first mortgage debt, as the Government claims for itself. Having permitted taxpayers Rogers to accumulate liability for withholding taxes extending over a period of approximately 18 months (R. 20, 25, 34, 64 and 65), the Government now hopes to effect collection, to the extent of $1,250.00, from the Respondents or one of them, although neither of the Respondents has ever had any liability for these taxes nor in any way been responsible for their nonpayment. This is more than any individual lienor could expect, and contrary to the result sought to be accomplished (as set out above) by passage of the legislation which is now 26 USCA 6323.

VI. THE GOVERNMENT WILL BE UNJUSTLY ENRICHED IF ITS TAX LIEN IS ACCORDED PRIORITY OVER AN ATTORNEY'S FEE SECURED BY A PRIOR RECORDED MORTGAGE.

As stated in the opinion below (R. 76), while there may be no decided case directly in point, the principles of unjust enrichment sustain Pioneer American's claim that its first mortgage lien should apply to the attorney's fee the same as to the remainder of the mortgage debt.

"A person is unjustly enriched if the retention of the benefit would be unjust." Cook v. Sears-Roebuck & Company (1947) 212 Ark 308, 206 SW 2d 20, 22.

Under the related equitable topics of restitution and money received, the Arkansas Supreme Court has held that an action will lie for recovery of money if a person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it. The main principle by which to test the matter is whether in equity and good conscience, and in view of the special facts of the case, one is entitled to retain money as against another. General Contract Purchase Corporation v. Clem (1952) 220 Ark. 863, 251 SW2d 112, 114.

Petitioner has made the point that no fund has been created here in the sense that attorneys do when they recover on a claim for damages. (Page 18 of Petitioner's Brief). This is true, but it is also a fact that a fund has been created in a different sense of transforming real estate into money. In the creation of this cash fund, subordinate lienors have been benefitted, whether or not they have engaged counsel of their own. A basic responsibility of plaintiff's attorney in a case such as this one is to assist the trial Court in supervising the foreclosure proceedings to the end that a purchaser at the foreclosure sale may receive merchantable title. This involves, among other things, searching the title to ascertain all claims against the property; joining all interested parties; seeing to proper service on all

parties; amendment of pleadings as required to bring necessary parties and issues before the Court; preparing the decree which sets out findings and orders affecting all parties; seeing to proper advertisement of the sale; and preparing conveyances and orders to effect transfer of title to the property and confirmation of the sale. These services benefit junior lienors as well as the foreclosing lienor, since any surplus funds result, in part at least, from proper rendition of the services.

Such services benefit subordinate lienors in the same way as fees for receivers, commissioners, trustees, and other officers of the Court. In this case the Government has made no objection to fees for a receiver and a commissioner. (R. 45, 50, 51, 53.) In the Government's Brief in opposition to certiorari in the Bond case, it was stated specifically that the Government made no objection to fees in connection with receivership and sale of the property. Government Brief (Footnote 5, Page 8) in opposition to certiorari, Bond v. United States (1960) 364 US 895, 5 L.Ed. 2d 189, 81 SCt 220.

When the present mortgagor first acquired this mortgage in 1956 (R. 18), taxpayers Rogers were not parties to the transaction. Pioneer American had a contract it had every right and reason to believe would be carried out in full, including a provision that in event of default and foreclosure, a reasonable attorney's fee would be made a part of the debt. Pioneer American had no control over the fact that Ocie A. Rogers and wife acquired the "equity" in the property. (R. 38.) Thereafter taxpayers Rogers defaulted in remitting

withholding taxes. Neither Pioneer American nor other prior lienors had any liability or duty whatever regarding such taxes, but under the Government's theory of this case, $1,250.00 would be taken away from the prior lienors and applied in payment of taxes owed by taxpayers Rogers. The substance of what the Government proposes is that Respondent, The Development Company, Inc., be required to pay taxes owed not by it, but by taxpayers Rogers. In equity and good conscience this should not be permitted.

CONCLUSION

The judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Title 26, USCA:

Section 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 6322. Period of Lien.

Unless another date is specifically fixed by law, the lien imposed by Section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

Section 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed by Section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under State or Territorial Laws.—In the office designated by the law of the State

or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; . . .

Arkansas Statutes (1947) Annotated:

51-1002. Lien Attaches When Recorded.—Every mortgage of real estate shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage.

68-101. Requirements for Negotiability.—An instrument to be negotiable must conform to the following requirements;

(1) It must be in writing and signed by the maker or drawer;

(2) Must coitain an unconditional promise or order to pay a sum certain in money;

. . . .

68-102. Sum Certain—Definition.—The sum payable is a sum certain within the meaning of the Act, although it is to be paid:

(1) With interest; or

. . .

(5) With costs of collection or an attor-

ney's fee, in case payment shall not be made at maturity.

68-910. Attorney's Fee—Provision Enforceable.—A provision in a promissory note for the payment of reasonable attorney's fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity.

APPENDIX B

SUMMARY OF LAWS OF STATES AND THE DISTRICT OF COLUMBIA AS TO ALLOWANCE OF ATTORNEY FEES UPON FORECLOSURE.

The following jurisictions allow attorney's fees in some form. (No effort is made to set forth various limitations which may apply.):

Alabama: Hylton v. Cothey (1932), 225 Ala 605, 144 So 579.

Arizona: Federal Land Bank of Berkely v. Warner (1933), 23 P2d 563, 42 Ariz 201, reversed on other grounds 54 SCt 571, 292 US 53, 78 L.Ed. 1120, 91 ALR 380.

Arkansas: Arkansas Statutes (1947) 68-910.

California: California Codes, Civil Procedure, Section 726.

Colorado: Denver Lumber & Manufacturing Company v. Capitol Life Insurance Company (1934), 96 Colo 21, 39 P2d 1036.

Connecticut: General Statutes of Connecticut (1958) Section 49-7.

Delaware: Delaware Code, Annotated, Title 10 Section 3912.

Florida: Gralyn Laundry v. Virginia Bond & Mortgage Corporation (1935), 121 Fla 312, 163 So 706.

Georgia: Georgia Code, Annotated, Section 20-506.

Idaho: Eagle Rock Corporation v. Idamont Hotel Company (1938), 50 Idaho 413, 85 P2d 242, 252.

Illinois: Phillip v. O'Connell (1947), 331 Ill App 511, 73 N.E.2d 864.

Indiana: Burns Indiana Statutes, Section 19-1918.

Iowa: Iowa Code, Annotated, Section 625.22.

Louisiana: Pugh v. Houseman Roofing Company, Inc. (1928), 165 La 795, 116 So 189.

Maine: Revised Statutes of Maine, Chapter 177 Section 6; Pepperell Trust Company v. Mehlman (1959), 155 Me 318, 154 A2d 161.

Maryland: Brennen v. Plitt (1943), 182 Md 348, 34 A2d 853.

Massachusetts: Leventhal v. Krinsky (1950), 325 Mass 336, 90 NE2d 545, 547, and cases cited at 90 NE2d 547.

Michigan: Michigan Revised Statutes, Section 27A. 2431.

Minnesota: Minnesota Statutes, Annotated, Section 582.01.

Missouri: American Savings Bank v. Sutton (1918), 204 SW 572.

Montana: Revised Codes of Montana, Title 93-8613.

New Mexico: Shortle v. McClosky (1935), 39 N. M. 273, 46 P2d 50.

New Jersey: Bank of Commerce v. Markakus (1956), 22 N.J. 428, 126 A2d 346.

New York: Civil Practice Act, Section 1513 authorizes additional allowances in "difficult and extraordinary" foreclosure actions. If such an allowance is requested, the actual attorney's fee incurred becomes relevant and the facts supporting the claim must be alleged and proved. Sullivan County National Bank v. Hall House Co. (1957), 8 Misc2d 733, 170 NYS 2d 748.

North Dakota: North Dakota Century Code, Annotated, Title 28, Section 26-04.

Oklahoma: Oklahoma Statutes, Annotated, Section 686.

Oregon: Parks v. Smith (1920), 95 Or 300, 186 P 552.

Pennsylvania: Foulke v. Hatfield Fair Grounds Bazaar, Inc. (1961), 196 Pa. Super. 155, 173 A2d 703.

Rhode Island: General Laws of Rhode Island (1956), Section 34-11-22.

South Carolina: Berry v. Caldwell (1922), 121 S.C. 418, 114 SE 405.

South Dakota: South Dakota Code of 1939, Section 33.1802.

Tennessee: Caroline Spruce Company v. Black Mountain R. Co. (1918), 139 Tenn 248, 201 SW 770.

Texas: John Hancock Mutual Life Insurance Company v. Davis (Texas Civ. App. 1942), 163 SW2d 433.

Utah: Jensen v. Lichtenstein (1915), 45 U 320, 145 P 1036.

Vermont: Vermont Statutes, Annotated, Section 4527.

Virginia: Code of Virginia of 1950, Section 55-39.

Washington: Revised Code of Washington, Section 4.84.020.

Wisconsin: Larscheid v. Hashek Manufacturing Company (1910), 142 Wis 172, 125 NW 442.

Wyoming: Wyoming Statutes, Section 34-78.

The following jurisdictions do not permit the recovery of attorney's fees:

Kansas: General Statutes of Kansas (1949), Chapter 67, Section 312.

Kentucky: Rilling v. Thompson (1876), 75 Ky 310, 12 Bush 310.

Nebraska: National Bank of North Bend v. Thompson (1911), 90 Neb 223, 133 NW 199.

North Carolina: General Statutes of North Carolina, Section 25-8; Security Finance Company v. Hendry (1925), 189 NC 549, 177 SE 629.

Ohio: Guzweiler v. Riverview Apartment (1936), 540 A 132, 6 NE2d 587.

West Virginia: Campen Brothers v. Stewart (1928), 106 W.Va. 247, 147 SE 381.

In the following jurisdictions, no authority was found one way or the other concerning allowance of attorney fees upon foreclosure:

Alaska
District of Columbia
Hawaii
Mississippi
Nevada
New Hampshire